85-1593

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

October Term, 1985

COUGHLIN, JAMES and
COUGHLIN, PATRICIA, his wife,
Petitioner

v.

WESTINGHOUSE BROADCASTING AND CABLE INC.,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE THIRD CIRCUIT COURT OF APPEALS

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QUESTIONS PRESENTED

Whether a media defendant, based on a videotape of an official report book in a police officer's hand, may falsely and without any actual proof from any source imagine and then broadcast the gravely serious charge that the officer received an envelope impliedly containing an illegal payoff and yet routinely obtain a summary judgment based on *New York Times Co. v. Sullivan*.

Whether the "actual malice" standard of *New York Times Co. v. Sullivan*, as applied by the courts below, was so inexorably weighted against the public libel plaintiff that it has become a mere token for routinely disregarding or minimizing genuine circumstantial evidence of the knowing or reckless disregard of falsity, thereby depriving the libel plaintiff of his right to a jury trial.

Whether, in a libel suit burdened by *New York Times*, the application of the Pennsylvania Shield Law, preventing discovery of *any* information in the possession of a media defendant, violates the Fourteenth Amendment by destroying a libel plaintiff's property and liberty interest in reputation, which interest is specifically vested by virtue of the Pennsylvania Constitution.

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REFERENCE TO OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 780 F.2d 340 (3d Cir. 1985).

The Opinion of the District Court is reported at 603 F. Supp. 377 (E.D. Pa. 1985).

STATEMENT OF GROUNDS FOR JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on December 30, 1985.

This Honorable Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. section 1254(1).

The jurisdiction of the District Court was based on the removal provision of 28 U.S.C. section 1441, based on diversity of citizenship.

STATUTE IN QUESTION

The Pennsylvania Shield Law, 42 Pa. C.S.A. section 5942(a), provides as follows:

> No person engaged on, connected with, or employed by any newspaper of general circulation or any press association or any radio or television station, or any magazine of general circulation, for the purpose of gathering, procuring, compiling, editing or publishing news, shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any government unit.

STATEMENT OF THE CASE

Introduction

This public official defamation case arose as the result of a television news special which was broadcast on February 17, 1982, by KYW-TV, a local Philadelphia television station owned by Westinghouse Broadcasting and Cable, Inc. The report, which was prepared by the so-called "I-Team," was entitled "After Hours on American Street."[1] It focused on the Ukranian American Club, a private club licensed under state law to serve alcoholic beverages after the standard closing time of public bars. The entire thrust of the program was aimed at showing that the club, about which neighbors complained bitterly, was operating beyond its own closing time and other legal limits. The inescapable conclusion driven home by Westinghouse was that this was

1. KYW-TV is owned by respondent Westinghouse Broadcasting and Cable Inc., hereinafter referred to as "Westinghouse."

the result of corruption in the Philadelphia Police Department and the Liquor Control Board.

The climax of the broadcast was a cleverly placed section of videotape showing Officer James Coughlin emerging from the club, allegedly at 4:18 a.m. on October 11, 1981. Having harangued Officer Coughlin for not wearing his cap and nightstick, the broadcaster cued the public that what was to follow was "the most suspicious police activity we saw on American Street." Officer Coughlin was then shown in a freeze frame with a circle around an object in his hand. The audio portion of the program at that point reported, "Well, the only paperwork we saw him doing was *carrying this envelope* out of the Club less than a minute after he went in." (Emphasis added).[2] The inescapable conclusion so carefully packaged and so powerfully delivered to the Philadelphia public was that Officer Coughlin had gone to the Ukranian American Club on a clandestine and illegal mission to pick up a payoff which had bought the cooperation of the police. In the context of a program which constantly repeated the suggestion of corruption, "questionable activity," and "suspicious activity," the broadcast unmistakably accused Officer Coughlin of the most base and disreputable illegal acts.[3]

The utter falsity of the attack on Officer Coughlin is so clear that it was not even an issue in this case. The District Court itself has acknowledged that the "defendant has not seriously challenged the plaintiff's explanation for the events of October 11, 1981." (A-38).

As demonstrated in the detailed recitation below, Officer Coughlin, a rookie officer fresh out of the academy, was not a suspicious underworld figure involved in illegal exploits. He was an inexperienced policeman performing some job functions for the very first time on the night he was videotaped by the hidden camera crew. While Mr. Coughlin may not have worn his cap or nightstick in performing the appointed duty of checking to see

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2. The show had previously stated that Coughlin had told police radio to "hold him out at headquarters for paperwork," and had not reported himself "back out on the street."

3. The District Court in fact determined that the broadcast "is clearly capable of a defamatory meaning" and that is not an issue for review. (A-37)

that the Ukranian American Club was closed, there was never any basis for the vicious and astonishing accusation of illegal conduct levelled against him.[4] The record is absolutely clear: Officer Coughlin had nothing whatsoever to do with any of the claimed problems associated with the Ukranian American Club or with alleged misfeasance, malfeasance or misconduct of any kind whatsoever. He was victimized purely and simply because of the uniform he wore and because his duties happened to place him in the line of a camera whose focus proved to be as destructive to him as the sights of any weapon.

The only evidence which can be found in the entire record of this case shows that the so-called "envelope" which Westinghouse identified was actually the officer's "48 book" containing official incident report forms. Even an FBI analysis of the videotape could not corroborate the extraordinary accusation that Officer Coughlin had an envelope. Conveniently, Westinghouse said it did not have videotape of Officer Coughlin going *into* the club. Such a tape would have shown him carrying his report book when he entered the club, not taking an "envelope" from the club. Despite the malignant fiction which has so unfairly branded Officer Coughlin, the courts below have turned a cold shoulder to all his efforts to restore his reputation.

The District Court confessed its serious doubt in granting a summary judgment to the defendant. It acknowledged, for instance, that "[a]n issue . . . exists as to whether the I-Team, with a minimum of effort, could have discovered the truth." (A-42). Yet, despite the strong circumstantial evidence showing that Westinghouse indulged in such vicious accusations without any support — save that it was predisposed to seize upon the worst imaginable conclusion — the District Court granted summary judgment for the defendant based on a belief that the evidence of actual malice was not enough. Stating that even indifference to the truth is "insufficient," (A-40), the District Court expressed its rigid view that the plaintiff's evidence did

4. The broadcast never even explained to the public that its accusation was premised completely upon the videotape, rather than some other evidence. The charge that Officer Coughlin was holding an envelope was simply stated as fact while the videotape was being shown.

not create a factual issue whether the defendant "entertained serious doubts," (A-40), or whether "only a reckless man would have put [the statements] in circulation." (A-41).

The error in granting summary judgment despite the existence of genuine evidence of actual malice was severely compounded by the court's refusal, based on the Pennsylvania Shield Law, to allow the plaintiff *any* discovery of film outtakes, of facts and sources supporting published statements, of facts detailing any steps taken to verify charges, or of evidence of the editorial thought process in producing the report. These traditional avenues of discovery were simply cut off. The media defendant was thus giver license to withhold any evidence which might show its knowing or reckless disregard of the truth. At the same time, all the outward manifestations of defendant's disregard for the truth were completely discounted by the District Court and Court of Appeals, including evidence of: the defendant's frustration with and pre-existing hostility toward the Philadelphia Police, the failure to interview even one other patrol officer despite a leisurely lack of time pressure before broadcast, the penchant to assume the worst at every opportunity, the use of an ambush interview with cameras rolling in front of the libel victim's home as a means of goading him into refusing to comment, the refusal to this very day to retract the libel despite the undisputed falsity of the defamation, and, most importantly, the sensationalized placement of a section of videotape showing completely innocent activity in such a way as to make it appear to the public that a crime was being committed.

Officer Coughlin was a random victim of actual malice whose reputation was sacrificed for no better reason than that he walked in front of a camera's jaundiced eye. If this libel is to be placed beyond legal reproach by virtue of *New York Times*, then any videotape of a public official performing any innocent activity may spawn the most alarming accusations of imagined illegal behavior and yet allow no legal recourse. It is submitted that the *New York Times* rule never contemplated such an abdication of legal accountability.

Because the facts are central to the error of the District Court and the Court of Appeals below, it is necessary to present the evidence in detail.

Officer Coughlin's Activities on October 11, 1981

James Coughlin was a high school dropout who received his high school equivalency diploma in the United States Army while he was serving as a truck driver in Vietnam. Upon his honorable discharge from the United States Army in February, 1972, he worked at various jobs, usually driving trucks. He was appointed to the Philadelphia Police Academy on May 18, 1981 and spent sixteen (16) weeks there. Upon his graduation, Officer Coughlin was assigned to the Third Police District in South Philadelphia under the supervision of Captain Russell Taylor. During the latter part of September and the early part of October of 1981, Officer Coughlin was receiving "on the job" training riding in police vehicles with experienced officers who were instructing him in various activities that would be required in the Third District. During this time he never actually operated a police vehicle, nor did he do any of the patrols by himself.

On October 5, 1981, Officer Coughlin's father died suddenly and James was given six days of funeral leave. When he returned to active duty he was assigned to the midnight to 8:00 a.m. shift beginning on October 10th at midnight. *It was to be his very first night on patrol alone*. He was assigned to Car 35 which generally covered the "C sector" of the Third District.

The first significant event of the evening for Officer Coughlin, one which was videotaped by Westinghouse, was his response to a report of a vandalism incident at the Ukranian American Club in C sector. Officer Coughlin had been ordered by radio to report to the club. He did so and was filmed talking briefly to the club's steward who was giving a report of the vandalism. As the tape clearly shows, paint had been splashed on the building and various insulting epithets had been painted on it.

According to Officer Coughlin, he then spent a long time sitting in his car filling out what is known as a "75-48" or incident report. This was the first such report that he had ever filled out.

Understandably, he was a little unsure how to do it. Finally, a police lieutenant pulled up in another vehicle and asked what Officer Coughlin was doing. Coughlin showed the "48" to the lieutenant and asked him if he thought it was all right. The lieutenant said that it seemed to be in order and that he should proceed with his duties. The videotape does not show Coughlin writing up the "48" or talking to another officer.

The tape does, however, show Officer Coughlin attempting to start the patrol car. Apparently because Coughlin fumbled with his keys, the narrator said that the officer in the car did not even appear to be Officer Coughlin, clearly implying that someone was "ghosting" the car; that is, that Coughlin pretended to be in the car, and wrote up his patrol log as if he was in the car, but was secretly somewhere else. When questioned, none of the Westinghouse employees could give any specific reason why this did not appear to be Coughlin. Officer Coughlin, while embarrassed that he fumbled with the keys, has explained that he was indeed the person in the car, as any complete videotaping and accurate viewing would have shown.

According to Officer Coughlin, the next significant event that evening occurred when he was called to Delaware and Christian Streets in Philadelphia by a Sargeant Nichols. The Sergeant had two flat tires at that location and had called car 34, driven that night by an Officer O'Hara. O'Hara was to "sit on the [disabled] car" while he, Sergeant Nichols, used car 34 for his patrol. O'Hara was to wait until the repair service from the Police Department came and fixed the tires. Coughlin was told that because of this he would have to perform the "club checks" for A and B sectors of the Third District.

Coughlin had never performed a "club check" before, nor did he know what it was. Officer O'Hara therefore explained on the spot what Coughlin should do. He told Coughlin that he was supposed to go to the club around 3:30 a.m., estimate the number of people in the club, make a notation on the "48," and make sure that everyone had left the club and that it was closed by 4:00 a.m. O'Hara then gave him five "48" forms which O'Hara had already filled out except for the time-out, time-in, and detail boxes. In essence, O'Hara said that having the forms would make

it simple. Coughlin just had to go to the addresses of the five clubs on the five "48" forms.

Officer Coughlin testified that he then checked out the clubs in the A and B sectors and went to headquarters to turn in the club checks. He duly informed the police radio that he was out of service and turning in his paperwork at headquarters. Coughlin testified that someone at Police Headquarters in the Third District then told him that because he was in the 35 car, he was also supposed to perform the club checks for C sector as well as A and B. Coughlin testified that the unidentified person at headquarters said that perhaps someone else had already checked out the clubs in C sector, but that he, Coughlin, should make sure. Coughlin then had to ascertain where these clubs were and put himself back in service.

When he arrived on American Street, he saw another police car leaving the club. At that point he wondered whether he should do the club check or find out from the other officer whether it had already been done. At first he pulled forward, then backed up and finally decided to pursue the other officer. He was unable to catch the car and therefore went back to see if the club had been closed. He pulled up in front of the club, double parked, and grabbed a "48" book from the seat of his car. He walked down the steps to the club with the "48" book, knocked on the door, and was told that another police officer had already done the club check. He then went back to his car and returned to his patrol.

That particular night never came to his mind again until sometime late in January, 1982, when he was told to report to the Internal Affairs Bureau, which investigates illegal police activity. He was told that he would be questioned about his club check at the Ukranian American Club on the night of October 11, 1981. On his first trip, however, Coughlin was told that he could go home. A few days later, sometime in early February, he was told to report to the Internal Affairs Bureau and see Staff Inspector Kelly. When Staff Inspector Kelly came into the room where

Coughlin was seated, he showed Coughlin his patrol log for October 11, 1981, and a 75-48 incident report concerning the vandalism at the Ukranian American Club. Kelly asked if he remembered them and Coughlin said he did.

Coughlin was then told by Kelly that he, Coughlin, had been accused of going into the club at 4:19 a.m., leaving with an envelope, getting into his car, and leaving the scene. Before Coughlin could say anything in response, he was officially read his "Miranda" warnings by Staff Inspector Kelly. Coughlin then said he did not wish to make a statement at that time and called the Fraternal Order of Police. A lawyer came down to the Internal Affairs Bureau but no further interview was conducted on that day.

Coughlin had heard rumors that the I-Team from Westinghouse (KYW-TV) generated reports of police activities at the Ukranian American Club, but he was not really sure what was going on, nor was he positive that the I-Team was his accuser. On February 10, 1982, however, when he was returning from work, he was approached outside his house by two men. One of them had what was obviously a television camera. The camera was running. The other man had a microphone in his hand. He stuck it in front of Coughlin's face, asking him if he had reported to headquarters to do paperwork on October 11th, four months before. Coughlin testified at his deposition that he asked them to turn the cameras off, but that they refused to do so. Coughlin also testified that he was very upset by this experience. He refused to be questioned under these circumstances. This was the sole "attempt" made by defendant to learn Officer Coughlin's explanation.

The next week an advertising and promotional campaign proclaimed that the special "I-Team" report entitled "After Hours on American Street" would appear and would show how the police had done nothing to stop the illegal activities in connection with an "after hours" club. That report was later broadcast to the expectant Philadelphia public. The very center of focus was, of course, the videotape of Officer Coughlin who was held out to the public by name for ridicule and disparagement.

Captain Russell Taylor testified at his deposition that the day after the program was on the air he called Officer Coughlin into his office and asked him what he had in his hand. Coughlin told Captain Taylor that it was a "48" book and that certainly he had not left the club with an envelope in his hand.

On March 22, 1982, Officer Coughlin had his formal interview at the Internal Affairs Bureau. He denied having an envelope and gave the explanation set forth above. No charges were ever brought against Officer Coughlin as a result of the Internal Affairs investigation. The matter is an official dead letter, although the stain from the Westinghouse accusation remains alive.

The Westinghouse "Investigation"

Westinghouse allegedly became interested in the Ukranian American Club late in 1980 when someone from KYW-TV received a telephone call from a neighbor of that club. That individual had recently moved next door to the club and told Westinghouse that she had been keeping a record of police activity on her street for the last few months. Basically, she said that she thought the police activity there was suspicious. As the managing director of the Westinghouse KYW-TV I-Team testified, there had been previous interest in exposing "phony clubs" and so a reporter and a cameraman were dispatched to the street to check out the club. It is abundantly clear that Westinghouse went to American Street with the expectation and for the specific purpose of finding evidence of police corruption.

Early in 1981, the reporter and cameraman apparently spent one night observing the scene from the neighbor's house. They found, however, that they could not photograph the club nor adequately observe the police activity from that location. Therefore, they rented a van. The cameraman stayed in the van while the reporter stayed in the neighbor's house.

That evening the police received an anonymous telephone call from a woman, saying that a woman had been dragged screaming into a white van located on American Street. Half a dozen police cars, alerted by radio, rushed to the scene. The

videotape of this incident, as well as the police radio report itself, clearly demonstrate that the police were and had reason to be extremely concerned about the telephone call and about locating the woman in the van. The reporter in the neighbor's house, having observed the police arrive, rushed down to the van and began demanding that the police cease their activities.[5] The police insisted upon being allowed entry into the van to check out the report. Having satisfied themselves that there was no crime, the police left. Westinghouse felt its cover had been destroyed, probably by the police. A complaint against the police was filed alleging that they had acted improperly. The station's General Manager believed that his reporters' First Amendment rights had been violated, and Westinghouse was not assuaged by the Police Commissioner's statement that the police had acted properly.

In October, 1982, Westinghouse began videotaping from another location. It did so on three separate nights. It was during the early morning hours of October 11, 1981, that they compiled their videotape of Officer Coughlin, who indisputably had no involvement with any of the matters which Westinghouse regarded so suspiciously and who had only assumed non-training duties on that very evening. Seizing upon the most disparaging possible interpretation of events which were perfectly innocent in themselves, the defendant determined to charge Officer Coughlin with reprehensible crimes *because he was filmed with a paper in his hand* — his 48 book. Westinghouse never obtained one bit of evidence from anyone or anywhere which supported the proposition that Officer Coughlin emerged from the Ukranian American Club with an envelope. All it had was its own sinister imagination fueled by months of frustrated suspicions about the police. Coughlin became the scapegoat for those frustrations.

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5. Interestingly, the same reporter and camera man had been involved in what has been called the Crefeld Street incident. Sometime prior to February of 1981, Westinghouse (KYW-TV) had been doing an investigation into police protection surrounding former Mayor Rizzo's house. Mayor Rizzo, having spotted their van, allegedly went into a rage and smashed the television camera. The police allegedly did nothing to restrain the Mayor. This incident obviously influenced the reporters' negative attitude toward the police.

Although given permission by the Police Department to request interviews with the police officers who patrolled the relevant sectors, Westinghouse made no attempt to contact any of the other patrol officers. In contacting Officer Coughlin, moreover, Westinghouse did not afford him treatment comparable to that given in interviewing the persons who had been campaigning against the club. Westinghouse, for example, chose not to call him on the telephone, show him the videotape, or do anything else that might have enabled him to respond intelligently to its accusations or to present his side of the story. Rather, it confronted him on the doorsteps of his home with a microphone and a running camera and accused him of criminal activity. This evidenced a state of mind truly anxious to feed the fires of a sensationalized story. Westinghouse created an atmosphere in which a response was simply impossible. It then showed the tape of this ambush in order to portray the plaintiff as guilty and evasive.

Even when the facts on Officer Coughlin were forced to its attention after the sensationalized story was broadcast, Westinghouse still made no attempt to verify that information or follow up on it in any way. At a talk show on Friday, February 20, 1982, Tom Garvey, the president of the Fraternal Order of Police, did state the facts surrounding the incident. (He had carefully verified these facts with Officer Coughlin before appearing on the program.) Westinghouse, having accused this officer of a very serious crime, felt no responsibility to check out or publicize the true facts presented to them. It chose instead to let its scathing story stand and only to issue the hollow promise to "follow up" on the situation on American Street, to follow the story very carefully and let the public know what eventually happened. None of its "follow-ups" provided the true explanation for Officer Coughlin's behavior.

These facts and circumstances supply ample evidence from which a jury could infer that the defendant acted with actual malice in misrepresenting the videotape of Officer Coughlin's innocent activity. The defendant went to American Street with

a purpose to find police corruption. Having found none, it conjured up a serious crime from its damning presentation of non-criminal conduct and gravely harmed the reputation of an innocent man who randomly fell prey to their trap.

In the effort to shield itself from any and all accountability, Westinghouse was additionally aided by the ability to pick and choose what information and evidence it produced in discovery. In this regard, it is indeed tragically ironic that Westinghouse has claimed that for some reason it did not happen to videotape Officer Coughlin's *entry* into the Ukranian American Club on the morning of October 11. If it had, that videotape would have shown him carrying his "48 book" *into* the club as well as out of the club, and *not* picking up an envelope. In tandem with its reliance on the actual malice standard, as understood in the Third Circuit Court, Westinghouse has thus successfully employed the Pennsylvania Shield Law to prevent discovery of any of the outtakes which were not actually broadcast. Officer Coughlin and the people of Philadelphia will never know if this videotape exists and will only be left to wonder why such a stakeout effort would have been so selective in videotaping only those acts which it could interpret as corruption, and not videotaping activity which would have disposed of that false accusation.

REASONS FOR GRANTING A WRIT OF CERTIORARI

I. The Wooden Application of the Times Standard so as to Discredit Substantial Circumstantial Evidence of Actual Malice Deprived the Plaintiff of His Right to a Jury Trial and Necessitates the Reconsideration of the Standard Itself

The actual malice standard inaugurated in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), was a judicial effort to prevent an excessive chill upon the publication of truthful, constitutionally protected speech. A sibling of the prior restraint doctrine, the actual malice standard was intended to quell the unbridled use of the common law defamation suit, a form of post-publication restraint. It was believed that if libel verdicts could

be rendered without any fault at all, the foreknowledge of that possibility might deter some publishers from printing or broadcasting what they legitimately believed was true. *Times* came into being to provide the media with a limited amount of breathing space in the event they inadvertently crossed into the realm of falsehood, a region not directly protected by the first amendment. *Id.* at 271-72; *see, e.g., Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952)("[l]ibelous utterances not . . . within the area of constitutionally protected speech").

As related by Justice White in *Dun & Bradstreet v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939 (1985), however, *Times* has proven to be "severe overkill." *Id.* at 2952. The standard has been taken too far. The unwitting victims have consistently been the interest in truth and the high value of reputation in a civilized society. This Honorable Court surely did not mean in *New York Times* to make the actual malice standard a journalistic model for good reporting. Nevertheless, the creation and subsequent evolution of the actual malice standard has alarmingly insulated media defendants from the effects of journalistic laxity. As stated by Justice White:

> The *New York Times* rule thus countenances two evils: first, the stream of information about public officials and public affairs is polluted and often remains polluted by false information; and second, the reputation and professional life of the defeated plaintiff may be destroyed by falsehoods that might have been avoided with a reasonable effort to investigate the facts. In terms of the First Amendment and reputational interests at stake, these seem grossly perverse results.

Id. at 2951; *accord, id.* at 2948 (Burger, C.J., concurring). No case better illustrates the very evils of which Justice White wrote than this case. The plaintiff, Officer Coughlin, was judicially deprived of any opportunity to place his true evidence of actual malice before a jury. The *Times* standard itself was given absolute dominance, overshadowing even substantial evidence.

In the present case the District and Circuit Courts magnified the overkill of *Times* and even overrode the admonition in

Hutchinson v. Proxmire, 443 U.S. 111, 120 n.9 (1979), that "[t]he proof of 'actual malice' calls a defendant's state of mind into question, *New York Times v. Sullivan*, . . . and does not lend itself to summary disposition." Although it is fundamental that the jury must determine the defendant's state of mind where, as here, the right to a jury trial has been exercised, the District Court invaded the jury's province by actually finding the facts against the plaintiff. It failed to recognize that its function was merely to determine whether evidence existed which, viewed as a whole, could permit a rational jury to conclude that the defendant recklessly disregarded the falsity of its defamation. The Court of Appeals for the Third Circuit then added its appellate imprimatur to this total disregard of the plaintiff's evidence.

Although any general survey of recent libel cases will yield occasional instances in which the actual malice standard has been satisfied by circumstantial evidence of the defendant's state of mind, *e.g.*, *Tavoulareas v. Piro*, 759 F.2d 90 (D.C. Cir.), *opinion vacated*, 763 F.2d 1472 (D.C. Cir. 1985); *Golden Bear v. Chase Revel, Inc.*, 708 F.2d 944 (5th Cir. 1983); *Hunt v. Liberty Lobby*, 720 F.2d 631 (11th Cir. 1983), the vast majority of cases, both state and federal, have held that the standard has not been met. The present case demonstrates how the *Times* standard has sometimes been applied as a total bar to recovery. The standard has not only been interpreted as a requirement that there be some evidence of actual malice to support a jury's verdict, but it has been treated as a requirement that the courts themselves must be persuaded as factfinders that actual malice exists before the jury will ever be summoned. This erroneous application of *Times* goes far beyond the instruction in *Bose Corp. v. Consumers Union of United States*, 104 S.Ct. 1949 (1984), that the appellate courts have an independent duty to see that there is evidence sufficient to allow a finding of actual malice. The courts below substituted the judge for the jury, even in the absence of a trial record, in finally weighing the evidence against the plaintiff.

A. Evidence of Defendant's Hostility Toward Philadelphia Police Was Probative of a State of Mind Susceptible to Knowing or Reckless Disregard of Falsity

The District Court in this case viewed in isolation each piece of circumstancial evidence of the defendant's state of mind and rejected it on qualitative grounds. It discarded, for instance, the evidence of the defendant's hostility toward the police and the predisposition to find and proclaim corruption. The Court stated flatly that "malice cannot be inferred from a reporter's hostility toward or bias against a subject." (A-40). While this evidence may not be dispositive, many authorities have properly recognized that animosity or ill will are probative of a state of mind susceptible or receptive to falsehood. *E.g., Goldwater v. Ginsberg*, 414 F.2d 324, 328-29, 337, 340, 342 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970); *Cochran v. Indianapolis Newspapers, Inc.*, 175 Ind. App. 548, 562, 372 N.E.2d 1211, 1221 (1978); *Sprouse v. Clay Communications, Inc.*, 158 W.Va. 427, 211 S.E.2d 674, 688, *cert. denied*, 423 U.S. 882 (1975). The District Court and the Court of Appeals in the present case, however, eliminated from any consideration this valid avenue of circumstantial proof, contrary to the teaching of a host of other cases.

B. Evidence of Improper Investigation Despite the Awareness of the Devastating Nature of the Criminal Accusations is Probative of the Knowing or Reckless Disregard of Falsity

The defendant further knew that by singling Officer Coughlin out as the epitome of corruption, the broadcast would have a devastating impact on him. "Knowledge of the harm likely to follow publication of a story is relevant to whether it was published with actual malice." *Tavoulareas v. Piro*, 759 F.2d 90, 131 (D.C. Cir.) (citing *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 170 (1967) (Warren, C.J. concurring)), *opinion vacated*, 763 F.2d 1472, 1481 (D.C. Cir. 1985).

Despite this certain knowledge of the serious harm which would befall the plaintiff, the defendant conducted no investigation of his alleged involvement in any of the imagined wrongdoing, except for seizing upon meaningless technicalities such as the fact that he was not wearing his cap or that he returned back to the street after going to headquarters for paperwork. The failure to verify what was or was not in Officer Coughlin's hand on October 11, 1982; the failure to interview any police patrol officer (apart from the ambush interview directed against Coughlin himself); the failure to inform the public that its "year long" investigation was in reality three days of apparently highly selective videotaping; and the failure subsequently to be responsive to the explanation of the facts of Officer Coughlin's innocent activities — all combined to produce the District Court's just criticism that the reporters showed *"little concern for the truth."* (A-39) (emphasis added). Each of these items is a proper part of plaintiff's proof of actual malice. And yet the District Court, viewing each in isolation, totally rejected the evidence by saying that "evidence of failure to investigate, even if it establishes that defendant was indifferent to the truth of an allegedly defamatory communication, is also insuffficent to show that defendant acted with malice." (A-40).

C. The Absence of Time Pressures Was, Viewed In the Totality of the Evidence, Probative of the Defendant's Knowing or Reckless Disregard of Falsity

The plaintiff's evidence also showed that the subject of the defamatory broadcast was not "hot news." It took four leisurely months for Westinghouse (KYW-TV) to air the broadcast of their October, 1981 videotaping. This fact was relevant in showing reckless disregard of falsity even if it is not sufficient standing alone to do so. As stated in *Tavoulareas, supra*, 759 F.2d at 131, "falsehoods uttered at leisure are more likely to be deliberate than those published in haste." *See Carson v. Allied News Co.*, 529 F.2d 206, 211 (7th Cir. 1976) (grant of summary judgment reversed); *Vandenberg v. Newsweek, Inc.*, 507 F.2d 1024, 1026

(5th Cir. 1975). Nevertheless, the District Court, with the approval of the Court of Appeals, also flatly and erroneously rejected this substantial proof as a matter of law in stating that "[t]he fact that the broadcast was not 'hot news' and defendant had time to investigate is not sufficient to demonstrate the existence of malice." (A-43).

D. The Invariable Tactic of Speculating and Inferring the Most Damaging Possible Conclusions Against Officer Coughlin Was Probative of Defendant's Knowing or Reckless Disregard of the Truth

The District Court likewise paid no attention to Officer Coughlin's proof that the conclusions drawn by the Westinghouse I-Team in the broadcast were invariably the most injurious speculations imaginable. By taking this approach the defendant created a suspicious and ugly image of criminal behavior out of the innocent activity of an inexperienced officer. When, for instance, it observed an embarrassed Coughlin fumbling with keys in car 35, it falsely concluded that a different officer was improperly in the patrol car, that some sinister switch had been pulled, and that logs had been deliberately falsified to cover up criminal activity. This was based totally on the most disparaging and hostile surmise. Because Officer Coughlin radioed that he was going to headquarters for paperwork on the checks of the clubs in sectors A and B, defendant interpreted his later appearance in sector C as a deliberate ruse instead of a last minute directive to an inexperienced officer. When it videotaped Coughlin with what all the evidence shows was his official incident book, it leaped to the damning conclusion that he had picked up an envelope which contained corrupt payoff money. This regular course of interpreting item after item of innocent evidence in the harshest and most accusatory light is directly relevant to proving actual malice.

In *Rebozo v. Washington Post Co.*, 637 F.2d 375 (5th Cir.), *cert. denied*, 454 U.S. 964 (1981), the court was presented with a memorandum revealing that a reporter was not certain who had cashed stolen stocks. One possibility was that the stocks were

cashed by Rebozo, a close friend of former President Nixon. The reporter charged in his article, however, that it *was* Rebozo. The Court stated:

> This memorandum, plus the fact that Kessler [the reporter] resolved the uncertainty expressed in it in such a way as to cast plaintiff Rebozo in the worst possible light and to make for Kessler a front page story of an episode which otherwise might not have commanded any significant attention, when taken in a light most favorable to Rebozo, could amount to evidence of the reporter's reckless disregard for the truth or falsity of the assertion. . . .

Id. at 382.

In the present case, Westinghouse took a film of an officer with his incident book and inflated that into the sensationalized climax of a television special by suggesting to the public that it was a payoff envelope. There never was any substantiation of that defamatory charge, before or after the broadcast. All the evidence shows that it was absolutely false. The penchant for assuming the very worst time after time has a significant bearing in proving actual malice, especially when it is considered together with the one-sided and superficial investigation, the lack of any time pressure, the reporters' preexisting hostility towards police, and the defendant's certain knowledge of the devastating effect from singling out Officer Coughlin. All of these circumstances combine with the collection of indisputable falsehoods in the broadcast to generate an abundance of evidence which, taken most favorably to Coughlin as plaintiff, would at least support submitting the issue of reckless disregard to the jury.

E. The Defendant's Deliberate Attempt to Silence the Plaintiff by Setting Up and Videotaping an Ambush Interview in Front of His House as the One and Only Method of Interviewing Him is Probative Evidence of Actual Malice

Despite the seriousness of the charges which defendant intended to publish and despite the ease with which its sinister

suspicions could have been resolved, it undertook to arrange a camera-on ambush interview with the plaintiff as he returned to his home one morning following night duty. The defendant's camera showed that the plaintiff was confused by this aggressive and accusatory assault. Naturally he would not be interviewed in this atmosphere. Defendant, of course, broadcast the entire befuddling and pathetic episode as if it were further proof with which to convict this innocent man who at no time prior to the ambush interview had ever refused to be interviewed. This conduct also revealed defendant's prepublication state of mind by corroborating its unwillingness to afford the target of a serious libel any genuine opportunity to explain himself. This ambush tactic was the defendant's first and only choice in contacting Officer Coughlin. It was a choice which from the outset was calculated to produce no information which could disturb the sensationalized attack which Westinghouse was already determined to broadcast.

F. The Defendant's Refusal to Retract Even After Being Advised of its Errors is Probative of a Knowing or Reckless Disregard of Falsity

The defendant's accusations are indisputably false. No evidence supports the payoff charge. Nevertheless, there has never been a retraction, even after the District Court itself stated that "[a]n issue . . . exists as to whether the I-Team, with a minimum of effort, could have discovered the truth." (A-42). The lie uttered against James Coughlin has thus been etched in granite.

Numerous cases have logically and correctly held that a refusal by a media defendant to retract despite specific denials and refutations is itself relevant evidence of actual malice. *E.g.*, *Golden Bear Distribution Systems, Inc. v. Chase Revel, Inc.*, 708 F.2d 944, 950 (5th Cir. 1983); *Sharon v. Time, Inc.*, 599 F.Supp. 538, 581 (S.D.N.Y. 1984); *Church of Scientology v. Dell Publishing Co.*, 362 F.Supp. 767, 770 (N.D.Cal. 1973). The District Court and Court of Appeals for the Third Circuit, however, have disregarded this clear and poignant evidence.

G. Conclusion

In determining that the above evidence, combined with the flagrant and inexcusable mischaracterization of the videotape itself, was all insufficient to permit a finding of malice, the District Court and Court of Appeals deprived the plaintiff of his constitutional right to a jury trial. Rather than evaluate what a jury could find, the courts below credited the self-serving testimony of the individuals who produced the libels. Naturally, none admitted acting recklessly or being aware that the accusations were false. The District Court determined that "although they did not seriously explore other possible explanations for Coughlin's behavior, the conclusions which they drew based on their observations were reasonable." (A-41). In making and approving a finding of reasonableness, however, the lower courts abandoned their limited role in passing upon a summary judgment motion and instead credited the disputed evidence offered by Westinghouse in its own behalf. When the proper standard is applied, however, the cumulative impact of the evidence should be inescapably sufficient to preclude summary judgment even by the clear and convincing standard which the Court of Appeals evidently applied. The District Court and Court of Appeals failed to give the evidence its due and in effect created a standard which is insurmountable in the absence of a confession of guilt by the defendant. This error, and the confusion which it both reflects and promises to generate, must be corrected and the "actual malice" standard of Times reconsidered by this Honorable Court.

II. Because the Pennsylvania Constitution Vests a Right of Reputation in its Citizens, the Use of the Pennsylvania Shield Law to Prevent any Discovery From a Media Defendant in a Public Official Libel Suit Already Burdened by the Times Standard Violates the Fourteenth Amendment

Although the majority of the panel of the Third Circuit Court of Appeals gave scant weight in its per curiam opinion to plaintiff's arguments and evidence, the comprehensive concurring opinion of Judge Becker acknowledged the seriousness of

the constitutional issues created by the combined use of the Pennsylvania Shield Law, 42 Pa. C.S.A. §5942(a), and the *Times* actual malice standard. Judge Becker observed:

> It is hard not to sympathize with plaintiffs. The *New York Times* standard makes it hard enough for a public figure to win a libel suit, even when faced, as here, with what any fair observer must agree is egregious conduct on the part of the media. (A-19).

Pointing out that the plaintiff's interest in reputation is not only "protected by the state constitution, but . . . has deep, philosophical foundations," (A-23), Judge Becker nevertheless explained that on balance victory was "not impossible" and therefore the due process clause was not impinged, (A-24). This conclusion was in error.

The Pennsylvania Constitution is a unique document, every bit as venerable in its history as the Constitution of the United States itself. In order to present the Petitioner's argument that the Pennsylvania Constitution vests in him a right of reputation which cannot under the fourteenth amendment be summarily denied, it is necessary to quote the pertinent provisions of the Pennsylvania Constitution.

Article I, Section 1 of the Pennsylvania Constitution provides as follows:

> All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and *reputation*, and of pursuing their own happiness. [Emphasis added]

This provision owes its origin to the Constitution of 1790, where it appeared as Section 1 of Article IX. *The Proceedings Relative to Calling the Conventions of 1776 and 1790* at 161 (John S. Wrestling, Harrisburg, 1825) [hereinafter cited as *"Proceedings"*].

In raising reputation to the same high level of importance in the Pennsylvania Constitution as life, liberty, property and the pursuit of happiness, the framers of 1790 made a remarkable and clear departure from the language that appeared in the prior

Constitution of 1776 and in other contemporary documents circulating in the colonies. The 1776 Constitution did not enumerate reputation as one of the protected constitutional rights; it alluded only to the rights of "enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety." Ch. I, §1 (quoted in *Proceedings* at 55). This language paralleled that found in section 1 of the Virginia Bill of Rights of June 12, 1776. *H.S. Commager, Documents of American History* at 103 (8th ed. 1968) [hereinafter referred to as "*Documents*"]. The Declaration of Independence of July 4, 1776, itself referred only to "Life, Liberty, and the pursuit of Happiness." *Documents* at 100.[6]

The next provision of the Pennsylvania Constitution directly applicable here is Section 7 of Article I. That provision states in pertinent part as follows:

> The printing press shall be free to every person who may undertake to examine the proceedings of the Legislature or any branch of government, and no law shall be ever made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, *being responsible for the abuse of that liberty*. [Emphasis added].

This language, including the critical phrase "being responsible for the abuse of that liberty," owes its origin to the Constitution of 1790. It has remained unchanged ever since. "While thus securing liberty to the press, the constitution has also steadily aimed at guarding against its abuse." *Commonwealth v. Swallow*, 8 Pa. Super. 539, 603 (1898).

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6. The Declarations and Resolves of the First Continental Congress, October 14, 1774, also made reference only to "life, liberty, and property," *Documents* at 83, the most familiar "triad" associated with the influential writings of John Locke. *See G. Wills, Inventing America: Jefferson's Declaration of Independence at* 229 (1978).

Finally, section 11 of Article I of the Pennsylvania Constitution is also of great significance. It completes the comprehensive scheme so well thought out by the framers. That section states:

> All courts shall be open: and every man for an injury done him in his lands, goods, person, or *reputation* shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the Commonwealth, in such manner, in such court and in such cases as the Legislature may by law direct. [Emphasis added.]

This provision has remained virtually unchanged from its original form in 1790 when it appeared as Article IX, Section 11.

In Article I, Sections 1, 7, and 11, the framers of the Pennsylvania Constitution established with as much permanence as was legally possible a set of "unalterable," "inherent," and "indefeasible" constitutional rights. The framers placed these absolute rights beyond the reach of any simple legislative act. Older and no less venerable than the federal Bill of Rights itself, these state constitutional provisions have at the very least raised the interest in reputation to the status of a right protected by the fourteenth amendment. Although the Pennsylvania Superior Court has in *Hatchard v. Westinghouse Broadcasting Co. KYW-TV 3*, No. 02219 Phila. 1982, Slip Op. (Pa. Super., Jan. 24, 1986) (a non-public plaintiff case), rejected the argument that the Pennsylvania Shield Law is rendered unconstitutional by the above quoted provisions, in the circumstances shown in this case the application of the Shield Law nonetheless offends the fourteenth amendment by conclusively stripping from the public plaintiff his vested right to protect his reputation.

To Officer Coughlin, the District Court's use of the Pennsylvania Shield Law to preclude not only the discovery of confidential sources but *also* any inquiry into editorial processes, struck what can only be described as a mortal blow to his libel action. Although, as the District Court stated, Officer Coughlin's explanation for the conduct depicted on the Westinghouse tape is not "seriously challenged" by the defendant (A-38) the Shield

Law has thus been instrumental in perpetuating the unjust stain upon Officer Coughlin's reputation. Indulgent in its legal posture, Westinghouse has never even bothered to retract the false and unsupportable accusations.

The fourteenth amendment's due process clause is directly violated by the fatal burden placed upon the libel plaintiff through the application of the Shield Law. Because the Pennyslvania Constitution gives explicit recognition of the right to vindicate by a court action one's guaranteed right of reputation, Officer Coughlin accrued a specific property and liberty interest in that action. *See Paul v. Davis*, 424 U.S. 693, 710-711 (1976).

In light of the state-constitutional guarantee of a right to pursue a lawsuit in the protection of one's reputation, the interjection of a state privilege statute which in reality extinguishes that right without any recourse is a direct impingement of a vested liberty and property interest. The state is not free to close the courtroom doors upon attempts to effectuate a vested state law guarantee.

The strength of the Petitioner's argument is clearly evident from the contrast with the limited nature of the decision in *Paul v. Davis*. In *Paul* the Court explained that fourteenth amendment due process protections did not apply to a state's violation of ah interest in reputation because the applicable

> Kentucky law does not extend to respondent any legal guarantee of present enjoyment of reputation which has been altered as a result of petitioner's actions. Rather, his interest in reputation is simply one of a number which the state may protect against injury by virtue of its tort laws. . . .

424 U.S. 711-712. In the present case, the Pennsylvania Constitution itself expressly confers the very guarantee which was lacking in *Paul*. In this setting, the application of a state statute which in reality destroys the benefit of the express guarantee of a right to protect one's reputation in court is an invasion of interests which are indeed protected by the fourteenth amendment. The application of the Pennsylvania Shield Law in the

circumstances of this public official case, is, therefore, genuinely worthy of this Court's review.

CONCLUSION

The Third Circuit Court of Appeals, in affirming the District Court's summary judgment for Respondent Westinghouse, has given the *Times* actual malice standard a force which was never intended. Although other Circuit and state courts have respected circumstantial evidence of actual malice, the Third Circuit rejected all of the plaintiff's substantial evidence, reaching far beyond the judicial function envisioned by *Times* and creating serious confusion about the meaning of "actual malice."

The "nearly impossible" threshold created by this use of the *Times* rule was further unfairly compounded in this case by the use of the Pennsylvania Shield Law to prevent the discovery of *any* information not publicly broadcast by the media defendant. The public official plaintiff thus suffered the total destruction of any libel remedy. This use of the Shield Law in the face of the *Times* burden deprived the plaintiff of his right to reputation, a right specifically guaranteed by the Pennsylvania Constitution. Because the plaintiff's right to reputation is a vested one, the total, summary deprivation of that right is in direct violation of the due process clause of the fourteenth amendment.

WHEREFORE, the Petitioner respectfully requests that this Honorable Court grant a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

James E. Beasley, Esquire
William P. Murphy, Esquire
Sarah M. Thompson, Esquire
Attorneys for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-1145

COUGHLIN, JAMES and COUGHLIN, PATRICIA h/w,
Appellants

vs.

WESTINGHOUSE BROADCASTING AND CABLE INC.

(D.C. Civ. No. 83-0944)

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: GARTH, BECKER and VAN DUSEN, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel October 21, 1985.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered February 28, 1985, be, and the same is hereby affirmed. Each party to bear its own costs.

ATTEST:

Clerk

December 30, 1985

COUGHLIN, James and Coughlin, Patricia, his wife, Appellants,
v.
WESTINGHOUSE BROADCASTING AND CABLE INC., Appellee.
No. 85-1145

United States Court of Appeals,
Third Circuit.
Argued Oct. 21, 1985.
Decided Dec. 30, 1985.
As Amended Jan. 6 and Jan. 14, 1986.

James E. Beasley, Sarah M. Thompson, William P. Murphy (Argued), Beasley, Hewson, Casey, Colleran, Erbstein & Thistle, Philadelphia, Pa. for appellants.

Jerome J. Shestack (Argued), Carl A. Solano, Robert F. Harchut, Schnader, Harrison, Segal & Lewis, Philadelphia, Pa., Stephen A. Hildebrandt, Westinghouse Broadcasting and Cable, Inc., Washington, D.C., for appellee.

Before GARTH and BECKER, Circuit Judges and VAN DUSEN, Senior Circuit Judge.

OPINION OF THE COURT

PER CURIAM.

Plaintiffs James and Patricia Coughlin filed suit against defendant Westinghouse Broadcasting and Cable, Inc. ("Westinghouse") alleging that Officer Coughlin, a Philadelphia police officer, was defamed by a series of television programs broadcast in February 1982 by KYW-TV, a Philadelphia television station owned and operated by Westinghouse.[1] According to Coughlin, those broadcasts impliedly accused him of accepting a bribe when it broadcast a clandestine videotape of Coughlin exiting a so-called after hours club with what appeared to be an

1. Plaintiff also asserted claims for false light (casting individual in false light), invasion of privacy, and intentional infliction of emotional distress. Mrs. Coughlin alleged loss of consortium. The district court granted summary judgment as to all these additional claims, and the parties have not addressed them separately on appeal.

envelope while on patrol duty. Coughlin also challenged the constitutionality under the state and federal constitutions of the Pennsylvania Shield Law, 42 PA.CONS.STAT.ANN. §5942(a) (Purdon 1982), which was applied by the district court to preclude plaintiff's discovery of outtakes and source materials used in preparation of the allegedly defamatory broadcasts.

On February 28, 1985, the district court, finding that Coughlin, a public official, had failed to adduce sufficient evidence raising a genuine issue of material fact as to the question of actual malice, granted summary judgment in favor of Westinghouse. The court also denied Coughlin's motion to compel discovery of KYW's news sources and editorial processes involved in making the documentary pursuant to the Pennsylvania Shield Law.

I.

This action arises out of a television broadcast of "After Hours on American Street," a February 17, 1982 news report prepared by the KYW-TV investigative news unit, the I-Team.[2] The broadcast stemmed from complaints registered by local residents in late 1980 that the Ukranian-American Club, located at 610 American Street in Philadelphia, was a so-called "after hours" club illegally selling liquor to the general public past the 3:00 A.M. closing time mandated by Pennsylvania state liquor law. The investigation conducted by the I-Team was directed to discovering whether citizen complaints that the responsible government authorities—the Philadelphia Police Department and the Pennsylvania Liquor Control Board—were not properly enforcing the liquor laws at the club.

From a concealed vantage point, the KYW I-Team filmed activities surrounding the Club on the nights of October 10, 11 and 17, 1981. Plaintiff Coughlin, at the time a rookie patrol officer, was assigned to the midnight to 8:00 A.M. patrol shift for the sector containing the Ukranian American Club. On the night

2. For a more detailed recitation of the relevant facts of this case, see the district court opinion, *Coughlin v. Westinghouse Broadcasting and Cable, Inc.*, 603 F.Supp. 377, 379-380 (E.D.Pa. 1985).

of October 11, 1981, Coughlin was directed by police radio to conduct a "club check" at the Ukranian Club at approximately 4:05 A.M. At the club, Coughlin was informed that another officer had in fact just been there, and Coughlin then proceeded to leave the club carrying what he claimed was his book of incident report forms in his right hand.

At 7:15 A.M. on the morning of February 10, 1982, while returning home from working the midnight patrol shift, Coughlin was approached by a reporter and cameraman from KYW-TV attempting to question him regarding the events on the night of October 11, 1981. Coughlin requested that no filming take place, asked that the reporter identify himself, and, calling KYW's behaviour "harassment," refused to answer any questions. KYW did not seek another interview with Coughlin. Coughlin, however, was told by his superiors at police headquarters that he was free to talk to the I-Team about this incident if he chose to do so.

When the videotape of Officer Coughlin's October 1981 activities was broadcast by KYW on February 17, 1982, and in follow-up reports on February 18 and 19, 1982, KYW stated that Coughlin was carrying an envelope when he exited the club on October 11, 1981. This interpretation of the incident as revealed on the videotape, combined with other statements in the broadcast concerning possible police corruption surrounding the enforcement of liquor laws at after hours clubs, combined to support Coughlin's charge that the broadcast accused him of taking a bribe.

An internal police investigation of Coughlin's activities failed to result in any charges being filed against him. Police officials testified that they believed Coughlin was carrying a "48" [incident report] book when he left the Club. Subsequent laboratory analysis of the film conducted by the police department and the FBI failed to conclusively establish what Officer Coughlin in fact had in his hand that night.

Applying the rule of *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), to this public official libel action, the district court held that Coughlin had the status of a public official; that the broadcast was capable of a defamatory

meaning; and that Coughlin had raised a genuine issue of material fact concerning the truth or falsity of those allegedly defamatory statements. *Coughlin*, 603 F.Supp. at 385. As to the issue of actual malice, the district court determined that Coughlin had failed to raise a genuine issue of material fact that KYW broadcast those statements "with knowledge that [the statements were] false or with reckless disregard of whether [they were] false or not." *Id.*, 376 U.S. at 279-80, 84 S.Ct. at 725-26. The court rejected Coughlin's contentions that Westinghouse's alleged hostility towards the Philadelphia police department, reliance on biased sources and failure to investigate constituted sufficient evidence of malice to withstand the defendant's motion for summary judgment. *Coughlin*, 603 F.Supp. at 386.

II.

We likewise reject Coughlin's contentions. We do so substantially for the reasons so well expressed in Chief Judge Luongo's thoughtful district court opinion. *Coughlin v. Westinghouse Broadcasting and Cable, Inc.*, 603 F.Supp. 377 (E.D. Pa. 1985). Accordingly, we hold that the district court correctly determined that Coughlin was a public official, and correctly concluded as well that Coughlin failed to raise a genuine issue of material fact as to the issue of actual malice.

With respect to the constitutional issue raised by Coughlin as to the Pennsylvania Shield Law, 42 PA.CONS.STAT.ANN. §5942(a) (Purdon 1982).[3] we recognize this issue was not presented as forcefully as the issue of actual malice under *New York*

3. 3. The Pennsylvania Shield Law, 42 PA.CONS.STAT.ANN. §5942(a) (Purdon 1982) provides:

§5942. Confidential communications to news reporters

(a) General rule.—No person engaged on, connected with, or employed by any newspaper of general circulation or any press association or any radio or television station, or any magazine of general circulation, for the purpose of gathering, procuring, compiling, editing or publishing news, shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any government unit.

Times. However, pursuant to our request at oral argument, the parties submitted more extensive briefs directed to the question of the constitutionality of invoking the Pennsylvania Shield Law to preclude discovery of a reporter's notes and sources by a plaintiff in a public official libel action. Upon review of their submissions, we are satisfied that the Pennsylvania Shield Law, as applied to public official libel actions, suffers from no state or federal constitutional infirmity. Specifically, we hold that the Shield law does not abridge any rights guaranteed by Article I, Sections 1, 7 or 11 of the Constitution of the Commonwealth of Pennsylvania. Nor does it result in a denial of due process in violation of the fourteenth amendment to the United States Constitution.[4]

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4. Article I, Section 1 of the Pennsylvania Constitution provides:

Section 1. Inherent rights of mankind

All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.

Article 1, Section 7 provides:

Sec. 7. Freedom of press and speech; libels

The printing press shall be free to every person who may undertake to examine the proceedings of the Legislature or any branch of government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty. No conviction shall be had in any prosecution for the publication of papers relating to the official conduct of officers or men in public capacity, or to any other matter proper for public investigation or information, where the fact that such publication was not maliciously or negligently made shall be established to the satisfaction of the jury; and in all indictments for libels the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases.

Article 1, Section 11 provides

Sec. 11. Court to be open; suits against the Commonwealth

All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.

Accordingly, we affirm the district court's order of February 28, 1985 which granted Westinghouse's motion for summary judgment.

Each party will bear its own costs.

BECKER, Circuit Judge, concurring:

Although I believe that Officer Coughlin has been defamed, I cannot fault the majority's conclusion that plaintiffs have not adduced evidence of malice or reckless disregard sufficient to meet the rigorous *New York Times* standard. Hence, I agree with the majority's conclusion that the district court did not err in granting summary judgment on the merits. What for me are the close and difficult questions in this case are whether the Pennsylvania Shield Law violates the Pennsylvania Constitution or the federal Constitution. These questions are essential to the outcome of the case because the Shield Law operates to choke off sources from which Coughlin might have proved actual malice or reckless disregard.

The majority states that the Shield Law survives both constitutional challenges. I agree. The majority does not state its reasoning on the crucial constitutional questions, however, so I cannot be sure of the foundation of our agreement. I believe that these questions are of sufficient complexity and importance that they deserve full analysis. The Pennsylvania constitutional questions have rarely been considered in the case law, never in depth. The federal constitutional question, although the subject of more litigation, presents difficult and complex issues that should not be dealt with summarily. I therefore write separately to explore the relevant history and to articulate the arguments and reasoning involved in these difficult questions.[1]

I. *THE PENNSYLVANIA SHIELD LAW*

The Pennsylvania Shield Law, 42 Pa.Cons.Stat.Ann. §5942(a) (Purdon 1982) provides, in relevant part:

1. I wish to acknowledge at the outset the excellent and comprehensive briefs filed by both parties. They made the difficult analyses much easier.

> *General Rule*. No person engaged on, connected with, or employed by any newspaper of general circulation or any press association or any radio or television station, or any magazine of general circulation, for the purpose of gathering, procuring, compiling, editing or publishing news, shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any governing unit.

The Pennsylvania courts have repeatedly emphasized the important interests served by the Shield Law, and have held that it is to be broadly construed. In *In re Taylor*, 412 Pa. 32, 193 A.2d 181 (1963), for example, the Supreme Court of Pennsylvania stated that the Shield Law was to be "liberally construed in favor of the newspapers and news media," *id*. at 40, 193 A.2d at 185, and it emphasized that the Shield Law served a vital public function:

> [I]mportant information, tips and leads will dry up and the public will often be deprived of the knowledge of dereliction of public duty, bribery, corruption, conspiracy, and other crimes committed or possibly committed by public officials or by powerful individuals or organizations, unless newsmen are able to *fully and completely* protect the sources of their information. It is vitally important that this public shield against government inefficiency, corruption and crime be preserved against piercing and erosion.

Id. The Court held that the Shield Law protected any documents that might provide evidence of a reporter's news sources. *Id*. 193 A.2d at 184-85. *See also Hepps v. Philadelphia Newspapers, Inc*., 506 Pa. 304, 327-28, 485 A.2d 374, 387 (1984) (reaffirming *Taylor* and emphasizing the breadth of the Shield Law), *prob. jur. noted*, ____U.S. ____105 S.Ct. 3496, 87, L.Ed.2d 628 (1985). This court has held that the Shield Law even protects "outtakes," *i.e*., filmed or recorded material not included in the broadcast, because the outtakes might reveal news sources. *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 277-78 (3d Cir. 1980).

II. *THE PLAINTIFFS' DISCOVERY REQUESTS*

Plaintiffs moved for discovery of (1) defendant's outtakes; (2) facts supporting statements made in the broadcast and the sources of those facts; (3) records or evidence of the defendant's efforts to verify its information; (4) the defendant's editorial processes as to each statement; and (5) the names of the defendant's allegedly confidential sources. *Coughlin v. Westinghouse Broadcasting and Cable*, 603 F.Supp. 377, 380 (E.D. Pa. 1985). The district court ruled that each of these requests was barred by the Shield Law, *id.* at 380 n. 2, and that the Shield Law violated neither the state nor the federal constitutions, *id.* at 381-83. The court relied on *Samuelson v. Susen*, 576 F.2d 546 (3d Cir. 1978), although that case was concerned solely with Ohio law, and on *Rosen v. N.L.R.B.*, 735 F.2d 564 (D.C. Cir. 1984), which dealt with a federal due process challenge to the application of the attorney-client privilege in a particular case. 603 F.Supp. at 382. The court also explained that it was reluctant to "second guess the state's policy decisions," *id.* at 383, embodied in the Shield Law.

The plaintiffs do not dispute that the Shield Law applies to all of the information sought. Therefore, although I have some doubts that the Shield Law does extend so far,[2] I will assume this to be true. The plaintiffs appeal the district court's rulings about the state and federal constitutionality of the Shield Law, arguing that the Shield Law violates art. 1 § 1 and art. 1 § 7, of the Pennsylvania Constitution,[3] as well as the due process clause of

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2. The Shield Law protects only sources of information, not the thought or editorial processes of reporters or news organizations. Neither plaintiffs' third nor fourth requests—evidence of defendants' efforts to verify its information and the editorial process of each statement—would necessarily disclose any information about the defendant's sources. The distinction between source information and information about editorial processes is well-recognized. *See, e.g.*, Note, *Source Protection in Libel Suits after Herbert v. Lando*, 81 Colum.L.Rev. 338, 359 (1981).

3. Plaintiffs raise one other state constitutional issue, whether the Shield Law violates art. I, § 11 which states, in relevant part, that "(a)ll courts shall be open; and every man for an injury done him in his . . . reputation shall have

the fourteenth amendment. I consider each of these contentions in turn.

III. *ARTICLE I, SECTION 1*

Pennsylvania Constitution art. I, §1 owes its origin to the Constitution of 1790, where it appeared as Article IX, section 1. *The Proceedings Relative to Calling the Conventions of 1776 and 1790* at 161 (John S. Wrestling, Harrisburg, 1825) (referred to hereinafter as "*Proceedings*"). It states:

> All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty of acquiring, possessing and protecting property *and reputation*, and of pursuing their own happiness.

(emphasis supplied). Except for being shifted to a more prominent place within the Constitution, the provision has remained unchanged since 1790.

The inclusion of reputation among the short list of "inherent and indefeasible" rights marked a departure from the

NOTES *(Continued)*

remedy by due course of law." Plaintiffs argue that this section guarantees them a cause of action for damage to reputation and that the Shield Law effectively abridges that right of action.

Leaving aside whether it may accurately be said that the Shield Law actually abridges a cause of action, or merely makes it more difficult to prosecute such an action, *see infra* pp. 21, 28 & n. 16, I believe that this argument rests upon a misreading of art. I, §11. That section was aimed at corrupt judges and court officers who extorted money for hearing cases, *see* C.R. Buckalew, An Examination of the Constitution of Pennsylvania 17-18 (1883); T.R. White, Commentaries on the Constitution of Pennsylvania 159-60 (1907), and was intended only to guarantee equal access for all litigants. It was not meant to enshrine any causes of action in the state constitution. *Cf. McCollum v. Birmingham Post Co.*, 259 Ala. 88, 65 So.2d 689 (1953) (interpreting a substantially similar clause of the Alabama Constitution in the same way). The Pennsylvania Supreme Court has at least twice expressly rejected the argument that art. 1 §11 limits the power of the legislature to create, abolish, or limit causes of action, *Freezer Storage, Inc., v. Armstrong Cork, Inc.*, 476 Pa. 270, 281, 382 A.2d 715, 721 (1978); *Singer v. Sheppard*, 464 Pa. 387, 399, 346 A.2d 897, 903 (1975).

then-prevailing constitution of 1776 which had referred to the rights of "enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety." Ch. I §1. *See Proceedings* at 55. Indeed, most similar documents of the day did not elevate reputation to the pantheon of inalienable rights. *See, e.g.*, Virginia Bill of Rights, of June 12, 1776 (*reprinted in* H.S. Commager, *Documents of American History* 103 (9th ed. 1973)); Declaration of Independence (*reprinted in* Commager at 100 (referring to "Life, Liberty, and the pursuit of Happiness"); The Declarations and Resolves of the First Continental Congress, October 14, 1774 (*reprinted in* Commager at 83) (referring to "life, liberty, and property"). The Pennsylvania Constitution was one of the few that expanded the list. *Cf.* Article XI Massachusetts Bill of Rights of 1780 (*reprinted in* Commager at 107) (guaranteeing remedies for wrongs to "person, property, or character"). Pennsylvania's departure seems to have been prompted in part by the controversial case of *Respublica v. Oswald*, 1 Dall. 319, 1 L.Ed. 155 (Pa. 1788), which involved alleged libel by the press.[4] In addition, the proper balance between a free press and the protection of reputation was the subject of debate and litigation throughout the young nation. We can be confident that the inclusion of reputation in the Constitution was thoroughly discussed.

Given this background, we may assume that the inclusion of reputation in the Constitution was not merely rhetorical or lightly considered. It reflected a considered choice that we must respect. *Cf. Commonwealth v. Swallow*, 8 Pa.Super. 539, 603 (1898) ("Among the rights declared by the constitutions of 1790,

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4. Oswald, a newspaper publisher, was arrested for libel. After his release on bail, he published an article accusing several members of the state Supreme Court of bias. He was cited for contempt of court. The Supreme Court upheld the contempt charge, rejecting Oswald's argument that freedom of the press guaranteed him immunity. Both Chief Justice McKean, who sat on the case, and William Lewis, who prosecuted Oswald's contempt citation, were delegates to the Convention of 1790. R.L. Brunhouse, *The Counter-Revolution in Pennsylvania, 1776-1790* 225 (1942).

1838, and 1873 to be 'inherent and indefensible' is that of protecting reputation"). Reputation was put on the same constitutional footing as life, liberty and property, *Meas v. Johnson*, 185 Pa. 12, 19, 39 A. 562, 563 (1898), and it is therefore undeniable that the Pennsylvania Constitution creates a right in reputation which the judiciary is bound to protect.[5]

Plaintiffs argue that the Shield Law makes it so difficult to prosecute a defamation or libel action that their right of reputation is effectively denied. The argument has force: libel suits and defamation suits are the only ways private individuals can protect their reputation rights against infringement by a powerful media, and the Shield Law in conjunction with the "actual malice" standard imposed by *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L. Ed. 2d 686 (1964) makes successful prosecution of libel and defamation suits exceedingly difficult for public figures.[6] Nevertheless, for the reasons stated below, I feel that the argument must ultimately fail.

Pennsylvania courts have held that the right to reputation, although undeniably enshrined in the Constitution, is not inviolable. Like other property rights with constitutional "guarantees," the right to reputation may suffer on account of a public policy or need for some other good. *See, e.g., Matson v. Margiotti*, 371 Pa. 188, 88 A.2d 892 (1952); *Commonwealth v.*

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5. I thus reject defendant's attempt to diminish the significance of the right to reputation, Neither the fact that Blackstone may have considered reputation less significant than other rights, *see* 1 W. Blackstone, Commentaries *122, nor the fact that constitutional conventions after 1790 debated the need to balance the right to reputation against the right of free expression, *see e.g.*, 5 Debates of the Convention to Amend the Constitution of Pennsylvania 589 (1973); 12 Proceedings and Debates of the Pennsylvania Convention, 1837-38 4-9 (1838), diminishes the importance of the right to reputation. Our interpretation of the Constitution should not be controlled by Blackstone. Subsequent debates are informative, but the fact that defendant points to no changes in art. 1, §1 on account of the debates leaves me unconvinced that the debates diminsh the force of that section.

6. A long line of cases demonstrates that police officers are public figures, *see, e.g., Time Inc. v. Pape*, 401 U.S. 279, 284, 91 S.Ct. 633, 636, 28 L. Ed. 2d 45 (1971); *St. Amant v. Thompson*, 390 U.S. 727, 739, 88 S. Ct. 1323, 1327, 20 L. Ed. 2d 262 (1968); *Henry v. Collins*, 380 U.S. 356, 357, 85 S. Ct. 992, 993, 13 L. Ed. 2d 892 (1965), and that point is not disputed here.

Murphy, 8 C.C. 399, 405 (1890) ("Just as private property may be taken by the state for the public benefit, so a man's character and reputation may be made to suffer for the public good.") When confronted with a choice between the right to reputation on the one hand, and public policy as expressed by an enactment of the state legislature on the other, a court is forced to balance the two considerations. Because this is purely a matter of state law, we must balance as we believe the state supreme court would.

We are faced with the initial problem that the Pennsylvania courts have not articulated a clear standard for the balance. Does legislation that infringes upon the right to reputation have to be the "least restrictive" alternative, that is, must it infringe on the right to reputation only as much as necessary to accomplish its goals? Or, does the legislation have to be only "reasonably related" to its goals to pass state constitutional muster?[7] We simply do not know.

Despite this problem, I think that we can reach an answer (and need not abstain, *see Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941)), because there have been several cases which, although not directly on point, are sufficiently similar as to be strongly suggestive that the Pennsylvania courts would uphold the Shield Law against this constitutional challenge. First among these cases is *Matson v. Margiotti, supra*, in which the Pennsylvania Supreme Court upheld the absolute immunity of the State Attorney General as a defense against a charge of libel. The Court reasoned that the plaintiff's interest in reputation notwithstanding, the goals served by the common law right of absolute immunity outweighed competing considerations.[8] Matson demonstrates that

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7. These are, of course, the tests often used in the federal due process and equal protection areas, but there is no reason that the Pennsylvania courts must be limited to these and cannot develop other standards for the interpretation of their own statute.

8. The Court said:

[N]either freedom of speech nor freedom to protect one's property and

the right to reputation may be overridden by a claim of privilege if the public interest so requires.

More recent cases such as *In re Taylor*, 412 Pa. at 32, 193 A.2d at 181, and *Hepps, supra*, 506 Pa. at 304, 485 A.2d at 374, although not explicitly concerned with the right of reputation, insist upon the value of the Shield Law to the functioning of the government. *Taylor* emphasized the institutional role of the press in a democratic government. *Hepps*, although less explicit than *Taylor* on this point, reaffirmed the breadth of the Shield Law's coverage. Since *Taylor* had extended the Shield Law's breadth on account of its crucial institutional role, it is reasonable to read into *Hepps'* holding a similar statement about the importance of the Shield Law for press and society.

Commonwealth v. Tate, 495 Pa. 158, 432 A.2d 1382 (1981), although not involving the Shield Law, provides further support for this position. The issue in *Tate* was whether people distributing leaflets on a college campus could be convicted of criminal trespass. The court framed the issue as a clash between the defendant's right to freedom of expression and the college's right to control activities on its own property. Balancing the two rights, the court held that the right to expression must prevail on account of the "invaluable" nature of free speech. *Id.* at 175, 432 A.2d at 1391. Admittedly, the factual circumstances of *Tate* are very different from those of this case, but the essential issue in the two cases is the reconciliation of the freedom of expression of

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NOTES *(Continued)*

reputation—each of which is guaranteed by the [Pennsylvania] Constitution—is unlimited, and it is obvious that they must sometimes be competing and conflicting . . . Even though the innocent may somethings suffer irreparable damage, it has been found to be in the public interest and therefore sounder and wiser public policy to "immunize" public officials [from liability for defamation].

371 Pa. at 202-03, 88 A.2d at 899. It is worthy of note that the official immunity at issue in *Matson* was part of the common law, and thus lacked the statutory authority of the reporters' privilege at issue here. It is also significant that whereas *Matson* suggested that libel suits against certain officers of the state might be completely barred, the Shield Law does not create a bar to suits, but merely restricts the evidence that may be used in such suits.

some and the property rights of others. The *Tate* decision demonstrates again the extremely high value the Pennsylvania Supreme Court places on free speech.

While the question is close, these cases suggest that the Pennsylvania Supreme Court has historically placed such importance on free speech in general, and on the Shield Law in particular, that it would uphold its constitutionality today against the art. 1, §1 challenge despite the consequent cost to the right of reputation. Perhaps the Pennsylvania courts, which are the authoritative interpreters of the Pennsylvania Constitution, will view the matter differently. Perhaps they will impose a "least restrictive alternative" analysis, or strike a somewhat different balance that will give libel plaintiffs a better chance of success.[9] As a federal judge I am more constrained, and seeing no clear way to narrow the Shield Law without emasculating it, *see* discussion *infra* at 349, I would leave any such exercise to the state courts if they are so disposed.

IV. *ARTICLE I, SECTION 7*

Plaintiffs' second argument relies on Pa. Const. art. I §7:

> The printing press shall be free to every person who may undertake to examine the proceedings of the Legislature or any branch of government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write, print on any subject, *being responsible for the abuse of that liberty*. . . .

(emphasis supplied). The restraint on the press imposed by the requirement that the press be responsible for abuses of its liberty entered the Constitution in 1790, a product of the same conservative forces mentioned in the discussion of art. I §1. *See supra*

9. I note, however, that any finely tuned balancing may have to await the United States Supreme Court's decision in *Hepps*, 506 Pa. 304, 485 A.2d 374 (1984), *prob. jur. noted*, ___ U.S. ___, 105 S.Ct. 3496, 87 L.Ed. 2d 628 (1985), and *Liberty Lobby Inc. v. Anderson*, 746 F.2d 1563 (D.C. Cir. 1984), *cert. granted*, ___ U.S. ___, 105 S.Ct. 2672, 86 L.Ed. 2d 691 (1985). *See infra* n. 17.

Part III. The Constitution of 1776, by contrast, had no such restraints, focusing exclusively on the value of an unfettered press. Chapter I, section 12 of the Constitution of 1776, for example, said:

> [T]he people have a right to freedom of speech, and of writing and publishing their sentiments; therefore the freedom of the press ought not to be restrained.

Quoted at *Proceedings* at 56. Elsewhere the Constitution of 1776 stated:

> The printing presses shall be free to every person, who undertakes to examine the proceedings of the legislature, or any part of government.

Chapter II, section 35, quoted in *Proceedings* at 63. The earlier Constitution was thus clearly more concerned with preventing limitations on the press than with curbing potential abuses by the press. The Constitution of 1790, by contrast, evidences a significant concern with press abuses. The Superior Court of Pennsylvania has recently described the shift from the 1776 Constitution to the 1790 Constitution:

> The apparent absoluteness of the 1776 guarantee of freedom of expression and its capability for abuse gave rise to an exemption from its protection, for it soon became clear, that although the freedom of *expression* is arguably an absolute right, the right to *protection from prosecution for abuse of freedom* is a limited one.

Long v. 130 Market Street Gift and Novelty of Johnstown, 294 Pa.Super. 383, 398, 440 A.2d 517, 525 (1982).[10]

Plaintiffs' argument, simply stated, is that the Shield Law makes it virtually impossible for plaintiffs to succeed in a libel suit against the television station; that libel suits are the principle guarantors that the press be responsible for its abuse of liberty;

10. The Pennsylvania Supreme Court took an especially long historical view of art. I, §7 in *Goldman Theaters v. Dana*, 405 Pa. 83, 88, 173 A.2d 59, 62, *cert. denied*, 368 U.S. 897, 82 S.Ct. 174, 7 L.Ed.2d 93 (1962), tracing its roots back to Blackstone.

and, thus, that the Shield Law effectively absolves the defendant of all responsibility for the abuse of its liberty, in violation of art. I §7. I cannot accept this argument for two reasons. First, it requires an unjustifiably broad reading of art. I, §7. On its face, that section would require only that the press not be absolutely immune from libel and defamation actions. Clearly, the Shield Law would not violate this reading of art. I, §7. Plaintiffs, however, would have us read that section as guaranteeing not only that the press is not immune but also that plaintiffs have certain rights of access to press documents in libel and defamation actions. Plaintiffs can point to no elements of the legislative history of the provision that would justify this reading, however, and it is doubtful that the authors of 1790 had in mind such a right of access.

I am encouraged in this reading by the very similar case of *Maressa v. New Jersey Monthly*, 89 N.J. 176, 445 A.2d 376 (1982). In that case, the New Jersey Supreme Court considered a plaintiff's claim that the New Jersey Shield Law, N.J.Stat.Ann. §2A:84A-21 (West Supp. 1985), violated a state constitutional provision that "[e]very person may freely speak, write, and publish his sentiments on all subjects, *being responsible for the abuse of that right*." N.J. Const. art. 1, ¶ 6 (emphasis supplied). The Court rejected the plaintiff's argument, drawing the same distinction that we draw here; the Court interpreted the constitutional provision as merely precluding absolute immunity from libel actions, not requiring that all libel actions be unrestricted:

> The entire thrust of Art. 1, ¶ 6 is protection of speech. The framers, however, did not want that protection to be absolute. Specifically, they did not view the existence of a libel action as inimical to free speech. They therefore inserted a clause to insure that the broad speech protection they were providing would not be construed to preclude libel suits.
>
> This is all that the clause means. We do not believe that it was intended to create a right to sue for damages in libel. Had the framers intended such a right, they surely would have expressed that intent more directly.

Id. at 192, 445 A.2d at 385. *But see id.* at 202-03, 445 A.2d at 392-93 (Schreiber, J., dissenting) (arguing that New Jersey's Shield Law did violate that portion of the state's constitution). This reasoning is equally applicable to the Pennsylvania Constitution, art. I, §7.

The second reason we reject plaintiffs' argument under art. I, §7, is although the Shield Law affects the *manner* in which plaintiffs may develop evidence to support his defamation claim, it does not make successful defamation claims impossible. Plaintiff may use other evidence, both direct and circumstantial, to substantiate his claim. Admittedly, the plaintiffs' case is made much more difficult by the Shield Law, but that reflects a choice by the state legislature that it is not within our power to upset.

V. *PLAINTIFFS' DUE PROCESS CLAIM*

Plaintiffs argue that the Shield Law in conjunction with the heavy burden of proof imposed upon them by *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) makes it virtually impossible for them to protect their reputations by pursuing their libel claim. Because they have a property interest in reputation, *see* Pa. Const. art. I, §1, *supra* Part III, plaintiffs claim that they are denied due process.[11]

It is hard not to sympathize with plaintiffs. The *New York Times* standard makes it hard enough for a public figure to win a liable suit, even when faced, as here, with what any fair observer must agree is egregious conduct on the part of the media.

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11. It is important to note that my conclusion that the Shield Law does not violate the Pennsylvania Constitution does not preclude the possibility that the Shield Law violates the due process clause. The questions asked and issues raised in the two inquiries may be similar, *see supra* n. 7; however, the standards that we use to evaluate the two questions may be different. The state courts might mandate a less demanding test or the state courts might focus on different factors than do the federal courts in due process cases. Either way, the state constitutional analysis concluding that the Shield Law passes state constitutional muster would not preclude a federal due process analysis.

The Shield Law makes it more difficult still.[12] Nevertheless, I am constrained by the decisions of the Supreme Court in this area, and persuaded by the reasoning of sister courts in similar cases, to find that the plaintiffs' argument must fail. Because neither the district court nor the majority of this panel discussed this issue in detail, I find it necessary to explore the background of reporters' privileges and shield laws.

A. *Reporters' Common Law Privileges*

My analysis begins with the seminal case of *Branzburg v. Hayes*, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972) in which three reporters, subpoenaed to appear before grand juries to divulge the names of certain of their informants, challenged the subpoenas on first amendment grounds. The reporters argued that they had promised confidentiality to their sources, and that they had a first amendment right to protect the confidentiality of their sources. By a vote of 5-4, with a plurality opinion by Justice White and a concurring opinion by Justice Powell, the court held that although the journalists' cultivation of confidential news sources was a part of news-gathering that deserved first amendment protection.[13] society's "fundamental" interest in law

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12. Other courts and scholars have noted the difficult position of public figures confronted with claims of reporters' privilege. *See, e.g., Carey v. Hume*, 492 F.2d 631, 634 (D.C. Cir. 1974), *cert. dismissed*, 417 U.S. 938, 94 S.Ct. 2654, 41 L.Ed.2d 661 (1974); *id.* at 640 (MacKinnon, J., concurring); *DeRoburt v. Gannett Co., Inc.*, 507 F.Supp. 880, 884 (D. Hawaii 1980). *See also* Sack, *Special Discovery Problems in Media Cases* 6 Litigation 21, 22-23 (1980).

13. All of the justices acknowledged that the confidentiality of sources did have a basis in the first amendment. *See* 408 U.S. at 681, 92 S.Ct. at 2656 (opinion of White J., joined by Blackmun, Rehnquist, JJ., and Burger, C.J.) ("[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated."); *id* at 709, 92 S.Ct. at 2670 (Powell, J., concurring) ("The Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources."); *id.* at 712, 92 S.Ct. at 2671 (Douglas, J., dissenting) ("[T]he First Amendment protects [a reporter] against an appearance before a grand jury."); *id.* at 725, 92 S.Ct. at 2671 (Stewart, J., dissenting,

enforcement overrode the first amendment interests at stake.

In the wake of *Branzburg*, courts faced with assertions of reporters' privileges have proceeded on a case-by-case basis,[14] balancing the reporters' rights against the interests of those seeking information. *United States v. Criden*, 633 F.2d 346 (3d Cir, 1980), *cert. denied*, 449 U.S. 113, 101 S.Ct. 924, 66 L.Ed.2d 842 (1981); *United States v. Cuthbertson*, 630 F.2d 139 (3d Cir.) *cert. denied* sub nom. *Cuthbertson v. C.B.S Inc.*, 449 U.S. 1126, 101 S.Ct. 945, 67 L.Ed.2d 113 (1981); *Miller v. Transamerica Press, Inc.*, 621 F.2d 721, 726, *on rehearing* 628 F.2d 932 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041, 101 S.Ct. 1759, 68 L.Ed.2d 238 (1981); *Palandjian v. Pahlavi*, 103 F.R.D. 410 (D.D.C. 1984); *Continental Cablevision v. Storer Broadcasting*, 583 F.Supp. 427 (E.D. Mo. 1984). As a result of their case-by-case analyses, the courts eventually fashioned a three-step test, first articulated in *Garland v. Torre*, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910, 79 S.Ct. 237, 3 L.Ed.2d 231 (1958), for resolving the privilege cases: the reporter's privilege is overridden only if (a) the information sought is relevant, (b) it cannot be obtained by alternative means, and (c) there is a compelling interest in the information. *See, e.g., Criden, supra; Cuthbertson, supra; Miller, supra; Continental Cablevision, supra.*

B. *The Statutory Privilege*

The situation in this case differs from that in the cases just cited, for here we have a shield law, a statutory privilege, whereas those cases involved the constitutional, common law privilege. Although there was no statutory privilege at issue in *Branzburg*, the Court there considered how such a law might have affected its analysis:

NOTES *(Continued)*

joined by Brennan and Marshall, JJ.) ("The reporter's constitutional right to a confidential relationship with his source stems from the broad societal interest in a full and free flow of information to the public.").

14. Justice Powell's concurrence in *Branzburg* had suggested that this was precisely the course that the lower courts should take. 408 U.S. at 710, 92 S.Ct. at 2671.

> There is . . . merit in leaving the legislatures free, within First Amendment limits, to fashion their own standards in light of the conditions and problems with respect to their relations between law enforcement officials and press in their own areas. *It goes without saying, of course, that we are powerless to bar state courts from responding in their own way and construing their own constitutions so as to recognize a newsman's privilege, either qualified or absolute.*

408 U.S. at 706, 92 S.Ct. at 2669 (emphasis supplied). Following *Branzburg*, courts insisted that state shield laws deserve great deference and are virtually immune from judicial scrutiny. In *Fischer v. McGowan*, 585 F. Supp. 978, 988 (D.R.I. 1984), for example, the court said:

> [T]his court (whether or not sympathetic to the predicament of the parties) has no choice but to effectuate the balance struck by the Rhode Island General Assembly and to follow exactly the letter of a well-drawn legislative enactment.

(footnote omitted). In *Maressa*, 89 N.J. at 201-02, 445 A.2d at 389-90, the court took a similar position: "[T]he Legislature has weighed the competing interests in a free press and the individual interest in reputation. It has chosen to give greater protection to freedom of speech, and our duty is to enforce that choice." (footnote omitted).

It would appear the the Supreme Court's strong dictum in *Branzburg* and the precedent of *Fischer* and *Maressa* would control this case and make our ruling in favor of the defendants quite obvious. This appears to have been the position of the district court which refused to "second guess the state's policy decisions." *Coughlin*, 603 F. Supp. at 383. Our case is different from *Fischer* and *Maressa*, however, for in those cases the parties seeking to overcome the reporters' privileges did not assert federal constitutional rights; here, by contrast, plaintiff makes a due process argument. Whereas courts may defer to legislatures when parties make policy arguments in favor of overturning reporters' statutory privileges, courts cannot defer to the judgment

of legislatures when the party seeking to overcome the privilege himself asserts a constitutional right. A legislative preference cannot limit a constitutional right.

C. *The Relevance of Mathews v. Eldridge*

Once it is recognized that deference to the state's policy determination embodied in the Shield Law is inappropriate on account of plaintiffs' due process claim, it seems clear that a *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) balancing test is appropriate. Admittedly, this is not the standard setting for the balancing test, but a brief analysis of the situation reveals that it is structurally identical to the more familiar domains of the *Mathews* test: plaintiffs have an undeniable property interest in reputation, *see supra*, Part III, and the question is whether the Shield Law renders their judicial recourse so difficult as to be meaningless and thus a denial of due process. The question, that is, is how much process is due.

Mathews warned that due process " 'is not a technical conception with a fixed content unrelated to time, place and circumstance' " 424 U.S. at 334, 96 S.Ct. at 902 quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961)), and gave three factors for a court to consider in determining whether a party had been given sufficient process:

> [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official actions; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Id. at 335, 96 S.Ct. at 903.

Here, the private interest at stake is clear and significant—Officer Coughlin's reputation. Not only is reputation protected by the state constitution, but it has deep, philosophical foundations: the high value we place on reputation "reflects no more than out basic concept of the essential dignity and worth of every human being." *Rosenblatt v. Baer*, 383 U.S. 75, 92, 86 S.Ct. 669, 679, 15 L.Ed.2d 597 (1966) (Stewart, J., concurring). Furthermore, the Shield Law clearly increases the chances that plaintiffs will be erroneously deprived of their property interests: as noted above, the Shield Law makes it significantly more difficult for plaintiffs to prove actual malice than it would be without the Shield Law.

Weighed against these considerable interests are the state's interest in maintaining a free and uninhibited press and the vital role that the Shield Law plays in maintaining that free press. I have already referred to cases in the state courts that have spoken of the crucial structural role played by the press and the Shield Law. The significance of the Shield Law is attested to by the fact that at least 26 states have enacted their own shield laws,[15] many of them similar to Pennsylvania's.

Making exceptions to the Shield Law would impose a considerable burden on the state because of the inevitable uncertainty to which the exception would lead. Parties could not be certain that their conversations and tips would be confidential

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19. 15. *See* Ala.Code §12-21-142 (1975); Alaska Stat. §§09.25.150-.220 (1983 & Supp. 1984); Ariz.Rev.Stat.Ann. §12-2237 (1982); Ark.Stat.Ann. §43-917 (1977); Cal.Evid.Code §1070 (West Supp.1985); Del.Code Ann. tit. 10, §§4320-4326 (1974); Ill.Ann.Stat. ch. 110, §§ 8-901 to -909 (Smith-Hurd 1984); Ind.Code Ann. §34-3-5-1 (Burns 1973 & Supp,1984); Ky. Rev.Stat.Ann. §421.100 (Baldwin 1979); La. Rev.Stat.Ann. §§45:1451-1454 (1982); Md.Cts. & Jud.Proc.Code Ann. §9-112 (1984); Mich. Comp. Laws Ann. §767-51 (West 1982); Minn. Stat. §§595.021-025 (1982) Mont.Code Ann. §§26-1-901 to -903 (1983); Neb.Rev.Stat. §§20-144 to 147 (1977); Nev.Rev.Stat §49-275 (1981); N.J.Stat.Ann. §2A:84A-21 to -21.9 (West Supp. 1984-1985); N.M.Stat.Ann. §38-6-7 (Supp. 1984); N.Y.Civ.Rights Law & 79-h (McKinney 1976 & Supp.1984-1985); N.D. Cent. Code §31-01-06.2 (1976); Ohio Rev. Code Ann. §§2739-04-12 (Page 1981); Okla.Stat. tit. 12, §2506 (1981); Or.Rev.Stat. §§44.510-540 (1983); 42 Pa.Con.Stat.Ann. §5942 (Purdon 1982); R.I.Gen.Laws §§9-19.1-1 to -3 (Supp. 1984); Tenn.Code Ann. §24-1-208 (1980).

and protected, and the stream of information flowing to reporters and then to the public might be severely diminished. No sensitive observer could deny that the balance is a close one about which reasonable people could disagree. Nevertheless, I believe that the balance tilts in favor of the state. The plaintiff is not denied his opportunity to bring his case to court and have it heard; victory, while not easy, is also not impossible.[16] Thus, I believe that the Shield Law survives the *Mathews v. Eldridge* analysis, and I concur with the majority on this point.[17]

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16. As the court in *Samuelson v. Susen*, 576 F.2d 546, 522 (3d Cir. 1978) said about Ohio's shield law: "No doubt the statutory provisions affect the manner in which plaintiff may develop evidence to support his defamation claim. Plaintiff is not, however, foreclosed from prosecuting his claim with other evidence, both direct and circumstantial."

17. Two other federal constitutional issues deserve mention. First, defamation plaintiffs are required to show actual malice with "convincing clarity," *Bose Corp. v. Consumer Corp.*, _____U.S. _____, _____, 104 S.Ct. 1949, 1965 (1984); *Gertz v. Robert Welch*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1984), but there is some question whether the convincing clarity standard applies at the summary judgment stage. That is, to deny a defendant's motion for summary judgment must a district court conclude that a reasonable jury could (i) find existence of actual malice, or (ii) find existence of actual malice *with convincing clarity* (in either case on the basis of the evidence taken in the light most favorable to the plaintiffs)? The district court relied upon *Liberty Lobby Inc. v. Anderson*, 746 F.2d 1563, 1569 (D.C. Cir. 1984), *cert. granted*, _____U.S. _____, 105 S.Ct. 2672, 86 L.Ed.2d 691 (1985); *but see Yiamouyiannis v. Consumers Union*, 619, F.2d 932, 940 (2d Cir. 1980), and ruled that the plaintiff only had to satisfy the first, weaker, requirement to defeat the defendant's motion. It found that the plaintiff had failed to meet even this lesser burden. On account of the lower court's disposition, we need not resolve this issue.

Second, although the majority does not discuss it, I believe that our scope of review is plenary on account of *Bose, supra*. *See Bender v. Williamsport School Dist.*, 741. F.2d 538, 542 n. 3 (1984), *cert. granted* _____U.S. _____, 105 S.Ct. 1167, 84 L.Ed.2d 319 (1985). This court thus differs with *Liberty Lobby, supra*, which held that *Bose* did not apply to court of appeals review of summary judgments.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES COUGHLIN and PATRICIA COUGHLIN	:	CIVIL ACTION
	:	
v.	:	NO. 83-0944
WESTINGHOUSE BROADCASTING AND CABLE, INC.	:	

ORDER

This 28th day of February, 1985, it is ORDERED that:

1. Plaintiffs' Motion to Compel Discovery is DENIED;

2. Defendant's Motion for Summary Judgment is GRANTED; and

3. Judgment is entered in favor of defendant Westinghouse Broadcasting and Cable, Inc.

_____

Ch. J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES COUGHLIN and PATRICIA COUGHLIN	:	CIVIL ACTION
	:	
v.		
	:	NO: 83-0944
WESTINGHOUSE BROADCASTING AND CABLE, INC.	:	

OPINION

LUONGO, Ch. J FEBRUARY 28, 1985

Plaintiffs James and Patricia Coughlin, a Philadelphia police officer and his wife, brought this defamation action because of a televised broadcast entitled "After Hours on American Street." The broadcast dealt with alleged official corruption in connection with a Philadelphia after hours club. KYW-TV (channel 3), a Philadelphia television station owned and operated by defendant Westinghouse Broadcasting & Cable, Inc., aired portions of the program on February 17, 18 and 19, 1982.

In 1981, KYW's investigative news team (the I-Team) received complaints concerning the Ukrainian-American Club on American Street in Philadelphia. According to local residents, the club's patrons were noisy and disruptive and the club consistently served liquor after 3:00 a.m., in violation of the Philadelphia Liquor Code. The residents charged that the Philadelphia police and the Liquor Control Board had ignored their complaints. Based on these reports, the I-Team began to investigate the club. The results of their investigation were broadcast in "After Hours on American Street." The program portrayed the activities which led to neighbors' complaints and reported that the investigation raised serious questions concerning whether members of the police department and the Liquor Control Board were doing their jobs. KYW reporter Stan Bohrman described a 1974 Pennsylvania Crime Commission report, which had concluded that Philadelphia's practice of using police

officers to enforce the liquor laws with respect to private clubs fostered corruption. The I-Team, according to the program, had observed police activities on American Street similar to those described by the Crime Commission. The program illustrated this point with films taken outside the club on October 11, 1982, describing the filmed activity as "the most suspicious activity we saw on American Street." The films, accompanied by commentary, first showed police car 39 arriving at the club. An officer entered the club at 3:52 a.m. and left five minutes later. A number of people remained in the club. At 3:57 Officer Coughlin, who was driving car 35, reported over police radio that he was returning to headquarters for paperwork. The officer in car 39 returned to the club at 4:04 land left at 4:11 without recording the stop in his patrol log. Coughlin then drove car 35 to the club, backed up slowly, and drove away. Several minutes later car 35 returned. Coughlin entered the club and came out almost immediately, carrying an object in his hand. At this point, KYW stopped the film and showed Coughlin with a circle drawn around the object in his hand. The accompanying narrative stated: "As far as police radio knows, car 35 is still out at headquarters doing paperwork. Well, the only paperwork we saw him doing was carrying this envelope out of the club less than a minute after he went in. That officer is Patrolman James Coughlin." Elsewhere in the broadcast the narrative stated that an officer who stops without reporting his location over police radio "generally does not want it known that he's there."

KYW then showed film clippings of Coughlin refusing to be interviewed by I-Team reporters about the events described above and another incident on October 11. According to Mr. Bohrman, car 35 had arrived at the Ukrainian-American Club at 12:50 a.m. on October 11 in response to a vandalism complaint. The I-Team noted that when the officer returned from investigating the complaint he tried four times to find the right key to start the car. Because the officer was apparently unfamiliar with car 35, the I-Team conjectured that he was not Officer Coughlin. Coughlin's name was on the official report of the incident, however, and the patrol log recorded him as being in car 35 from

12:00 to 8:00 a.m., October 11. In conclusion, the program reported several other facts for which the I-Team could find no apparent explanation. Coughlin had entered the club at 4:17 a.m. without his standard patrol equipment consisting of nightclub, uniform jacket and hat. Car 35's official patrol log contained an unexplained gap for the period between 4:00 and 4:20 a.m., during which the I-Team had observed Coughlin on American Street. At 3:57, however, Coughlin had reported that he was returning to headquarters for paperwork.

Plaintiff James Coughlin alleges that this program defamed him by implying that he had engaged in corrupt activities and accepted a bribe from the Ukrainian-American Club. He claims the program placed him in a false light, invaded his privacy, and caused him severe emotional distress. Plaintiff Patricia Coughlin seeks damages for loss of her husband's society, companionship and consortium. Plaintiffs seek punitive as well as compensatory damages, alleging that defendant's conduct in airing the broadcast was outrageous.

Currently before me are plaintiffs' motion to compel defendant to answer certain interrogatories and deposition questions and defendant's motion for summary judgment. I will deal with the discovery motion first, and then turn to the summary judgment motion.

I.

Plaintiffs have moved for discovery with respect to the following: (1) portions of defendant's videotapes not included in the broadcast ("outtakes"); (2) facts supporting statements made in the broadcast and sources of those facts; (3) efforts made by defendant to verify its information; (4) defendant's editorial processes as to each statement; and (5) defendant's allegedly confidential sources. Defendant opposes plaintiffs' motion on the ground that the information sought is privileged under the Pennsylvania Shield Law, 42 Pa. C.S.A. §5942(a).[1] Because I con-

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1. Since the allegedly defamatory statements were broadcast in Pennsylvania and the alleged target is a Pennsylvania citizen, I see no reason to reject

clude that Pennsylvania law protects this information from discovery, I will deny plaintiff's motion to compel.[2]

Pennsylvania's shield law provides:

> No person engaged on, connected with, or employed by any newspaper of general circulation or any press association or any radio or television station, or any magazine of general circulation, for the purpose of gathering, procuring, compiling, editing or publishing news, shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any government unit.

42 Pa. C.S.A. §5942(a). The Pennsylvania Supreme Court has held that the statute protects not only the identity of confidential sources but also "*documents*, inanimate objects *and all sources of information*." *In re Taylor*, 412 Pa. 32, 40, 193 A.2d 181, 185 (1963) (emphasis original).[3] The court reasoned that the shield law embodies a public policy supporting extensive protection of news sources. In order to effectuate that policy, the court declared, the law must be liberally interpreted in favor of the news media. *Id.* at 40-42, 193 A.2d at 185-86.

The Pennsylvania Supreme Court has recently asserted that the shield law gives media defendants extensive protection from discovery in civil libel cases. *Hepps v. Philadelphia Newspapers, Inc.*, 485 A.2d 374, 386-87 (Pa. 1984) (*Hepps II*). *Accord Lal v. CBS, Inc.*, 726 F.2d 97 (3d Cir. 1984); *Steaks Unlimited v. Deaner*, 623 F.2d 264 (3d Cir. 1980); *Mazzella v. Philadelphia Newspapers, Inc.*, 479 F. Supp. 523 (E.D.N.Y. 1979) (applying Pennsylvania's shield law); *Hepps v. Philadelphia Newspapers,*

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the parties' apparent assumption that Pennsylvania law applies in this diversity action. Under Fed.R.Evid. 501, therefore, questions of privilege must be determined in accordance with Pennsylvania Law.

2. My decision to deny plaintiffs' motion is based on the privilege established by Pennsylvania's shield law. I therefore need not determine whether the information requested is privileged under the First Amendment. *See Lal v. CBS, Inc.*, 726 F.2d 97, 100-01 (3d Cir. 1984).

3. The decision in *Taylor* was based on an earlier verison of the shield law. The current version, however, is "virtually identical" to the former statute. *Lal*, 726 F.2d at 100.

Inc., 3 Pa. D.&C. 3d 693, 707 (C.P. Chester County 1977) (*Hepps I*) (*Taylor* "establishes the privilege against disclosure as absolute"). The Court of Appeals for the Third Circuit, recognizing the breadth of the Pennsylvania shield law, has held that unpublished portions of a filmed interview are privileged even though the identity of the primary source has been revealed. *Steaks Unlimited*, 623 F.2d at 279. The court reasoned that the shield law, as interpreted by *Taylor*, protects secondary as well as primary sources of news. A reporter need not show that unidentified secondary sources actually exist. Under *Taylor*, the statutory privilege applies whenever forced disclosure of an unpublished statement or "outtake" *may* reveal the identity of other sources. *Id.* (citing *Taylor*, 412 Pa. at 43, 193 A.2d at 186). The same reasoning mandates protection of a reporter's notes and resource materials from discovery. *Lal v. CBS, Inc.*, 726 F.2d at 100-01; *Mazzella v. Philadelphia Newspapers, Inc.*, 479 F. Supp. at 528-29.

Consistently with the liberal, pro-media approach required by *Hepps II* and *Taylor*, information concerning defendant's editorial processes must also be protected from discovery. To permit an inquiry into reporters' thought processes and methods of developing a news presentation would undermine the expansive protection which the shield law provides for newsgathering activities. As the New Jersey Supreme Court stated in holding editorial processes to be protected by a shield law similar to Pennsylvania's: "Discovery of editorial processes is especially threatening to newspersons because it inhibits the exchange of ideas that is crucial to the functioning of a free and vigorous press." *Maressa v. New Jersey Monthly*, 89 N.J. 176, 188, 445 A.2d 376, 383, *cert. denied*, 459 U.S. 907 (1982).

Plaintiffs challenge the validity of the shield law under both the Pennsylvania and United States Constitutions. Plaintiffs cite Pa. Const. art. V, §10(c), which authorizes the Pennsylvania Supreme Court "to prescribe general rules governing practice, procedure and the conduct of all courts." Characterizing the shield law as a rule of evidence and thus as procedural, plaintiffs contend that the legislature unconstitutionally usurped judicial power by enacting the law. Under Pennsylvania law, however,

the legislature may "create or alter rules of evidence." *Rich Hill Coal Co. v. Bashore*, 334 Pa. 449, 485, 7 A.2d 302, 319 (1939). *See also Phillips v. Unemployment Compensation Board of Review*, 152 Pa. Super. Ct. 75, 82, 30 A.2d 718, 723 (1943); *Williams v. American Broadcasting Cos.*, 96 F.R.D. 658, 666 (W.D. Ark. 1983) (it is well established that recognition of a journalist's privilege is for the legislature.) If I were to accept plaintiffs' argument, I must invalidate Pennsylvania's longstanding practice of establishing rules of evidence and privilege by legislative action. I will not interpret Pennsylvania's constitution to require such a result.

Plaintiffs also argue that the shield law, as defendant interprets it, violates the due process guarantees of the Pennsylvania and United States Constitutions. Under the Pennsylvania constitution, protection of one's reputation is a fundamental right. Pa. Const. art. I, §1.[4] Although the constitution guarantees freedom of speech, it provides that a citizen is "responsible for the abuse of that liberty." *Id.* §7. The state's due process clause specifically provides for vindication of reputational interests in the courts: "All courts shall be open; and every man for an injury done him in his . . . reputation shall have remedy by due course of law." *Id.* §11.

Plaintiffs note that in order to prevail in this lawsuit they must prove defendant published false statements with "actual malice."[5] They claim that if they are barred from investigating defendant's outtakes, sources and editorial processes, they will be prevented from satisfying their heavy burden. Thus, they

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4. Section 1 provides: "All men . . . have certain inherent and indefeasible rights, among which are those of . . . . acquiring, possessing and protecting property and reputation."

5. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964), requires proof of actual malice because, as I conclude in the second section of this option, plaintiff James Coughlin is a public official. If Coughlin were not a public official for *New York Times* purposes, as plaintiffs contend, plaintiffs concede that they must prove malice in order to recover punitive damages. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349-50 (1974).

claim, the shield law in effect makes it impossible for libel victims to recover and grants the media an absolute license to defame. They urge that such a result cannot be reconciled with the Fifth and Fourteenth Amendments to the United States Constitution or with Pennsylvania's constitutional right to vindicate one's reputation in the courts.

The Third Circuit has rejected the argument that a privilege which limits a plaintiff 's ability to uncover evidence in a defamation case deprives him of access to the courts. *Samuelson v. Susen*, 576 F.2d 546, 553 (3d Cir. 1978). In *Samuelson*, plaintiff was allegedly defamed during a medical review committee's proceedings. Such proceedings were privileged under an applicable Ohio statute. Plaintiff argued that the statute violated his Fifth and Fourteenth Amendment due process rights by depriving him of information central to his cause of action and in effect denying him access to the courts. *Id.* at 552. The Third Circuit upheld the state legislature's right to establish privileges in order to further important public interests. The court stated: "No doubt the statutory provisions affect the manner in which plaintiff may develop evidence to support his defamation claim. Plaintiff is not, however, foreclosed from prosecuting his claim with other evidence, both direct and circumstantial." *Id.* at 553. Plaintiff s due process argument, according to the court, was "attenuated." *Id.* Similarly, the Court of Appeals for the District of Columbia Circuit has held that there is "no due process right to offer evidence barred by the attorney-client privilege," even if the evidence is necessary to establish a defamation claim. *Rosen v. NLRB*, 735 F.2d 564, 577 (D.C. Cir. 1984). The court reasoned:

> The attorney-client privilege is but one of several privileges that prevent parties themselves from adducing particular evidence, and thus create an obstacle to fact finding due to the broad judgment that the value of introducing such evidence is outweighed by the harm inflicted upon other policies and values. The explicit burdens imposed by such evidentiary rules have never, to our knowledge, been held

> inconsistent with due process in the civil law context, because such burdens are simply a necessary consequence of society's attempt to balance the value of the complete admissibility of probative evidence with other competing values, such as the protection of vital professional or associational relationships.

Id. at 572. *See also Branzburg v. Hayes*, 408 U.S. 665, 706 (1972) (states may recognize a journalist's privilege, "either qualified or absolute").

The fact that protection of reputation is a fundamental right in Pennsylvania does not change the result. The supreme court of Pennsylvania, recognizing that even constitutional rights are subject to limitations, has held that certain public officials are absolutely immune from liability for defamation. *Matson v. Margiotti*, 371 Pa. 188, 88 A.2d 892 (1952). According to the court:

> [N]either freedom of speech nor freedom to protect one's property and reputation — each of which is guaranteed by the [Pennsylvania] Constitution — is unlimited, and it is obvious that they must sometimes be competing and conflicting. . . . Even though the innocent may sometimes suffer irreparable damage, it has been found to be in the public interest and therefore sounder and wiser public policy to "immunize" public officials [from liability for defamation].

Id. at 202-03 88 A.2d at 899. *See also Hepps v. Philadelphia Newspapers, Inc.*, 485 A.2d 374, 380 (Pa. 1984). The Third Circuit in *Steaks Unlimited v. Deaner*, 623 F.2d 264, 277 n.62 (3d Cir. 1980), recognized that by protecting a media defendant's outtakes from discovery it was depriving the plaintiffs of important evidence. The court held, however, that it was bound by the Pennsylvania legislature's decision to provide broad protection to news sources. *Id.* at 279. According to the court, "to the extent a state chooses to authorize a cause of action for defamation, it may also limit the plaintiff's ability to prove his claim in order to promote other social purposes." *Id.* at 279 n.74.

Pennsylvania, like other jurisdictions, has established a number of conditional and absolute privileges applicable in defamation actions. Plaintiffs would have me second-guess the state's policy decisions and strike down an entire class of laws on the basis of an argument which the Third Circuit has characterized as "attenuated." I decline to do so.

Under Pennsylvania's shield law, defendant cannot be compelled to disclose information concerning outtakes, sources, or editorial processes. Plaintiffs also seek discovery with respect to the factual basis for the broadcast and defendant's efforts to verify its information. A review of the exhibits to plaintiffs' memorandum shows that plaintiffs have requested, and defendant has supplied, extensive material concerning defendant's investigation and the bases for the allegedly defamatory statements. Plaintiffs have not identified any specific factual information, other than that protected by the shield law, which defendant has failed to provide. Accordingly, plaintiffs' motion to compel discovery must be denied.

II.

Defendant Westinghouse has moved for summary judgment, claiming that the allegedly defamatory statements are not actionable and that plaintiffs cannot prove actual malice. Defendant's memorandum of law analyzes the broadcast statement by statement, purporting to show that the broadcast consisted of indisputably true statements, videotapes of actual occurrences, and protected expressions of opinion. In particular, Westinghouse defends the statement that Coughlin was carrying an envelope as an expression of I-Team reporters' subjective opinion. Defendant claims plaintiffs have produced no evidence from which it can be inferred that any KYW employee did not believe the statements in the broadcast to be true. Plaintiffs cannot, therefore, prove that defendant published the allegedly defamatory statements with "actual malice."

Plaintiffs claim that defendant has attempted to disguise the defamatory impact of the broadcast as a whole by analyzing each statement apart from its context. According to plaintiffs, the film

segments and accompanying narrative defamed Officer Coughlin by strongly implying that he had accepted a bribe. Plaintiffs also assert that Coughlin is not a "public official" for the purposes of *New York Times v. Sullivan*, 376 U.S. 254 (1964), and thus need not prove malice in order to prevail. Plaintiffs argue, however, that the record contains ample evidence of malice. They claim that I-Team reporters were hostile toward the police because of earlier confrontations between members of the I-Team and the police department, and that the investigation on American Streets arose from a desire to discover official corruption. Reporters filmed police activities which could conceivably be interpreted as suspicious, and developed a broadcast on the basis of those activities. Although the I-Team's observations were made in October of 1981, and the broadcast was not aired until February of 1982, plaintiffs claim reporters made no realistic effort to determine whether innocent explanations existed for the videotaped activities. Plaintiffs also assert that the I-Team, in developing the broadcast, relied solely upon sources biased against the police and the Ukrainian-American Club.

Plaintiffs claim that a minimal investigation would have revealed that on October 11, 1981, Officer Coughlin was a rookie policeman patrolling alone for the first time. Early in his shift, he was ordered to investigate a vandalism complaint at the Ukrainian-American Club. After talking to the club's stewart, he returned to his patrol car and filled out a "48" book, used by police to file incident reports. He attributes his difficulty in starting the car to the fact that he had never driven a patrol car before that night. Plaintiffs object to the broadcast statement that the officer in car 35 did not appear to be Coughlin. According to plaintiffs, this statement implied that Coughlin had someone else surreptitiously take his place and fill out his reports while he was somewhere else, perhaps inside the club.

At approximately 2:45 a.m. on October 11, Coughlin was ordered to check serveral private clubs outside his assigned patrol area to ensure compliance with city liquor laws. He had never performed a club check before, and one of his fellow officers had to explain his duties to him in detail. At 3:57, after checking the clubs, he reported over police radio that he was

returning to headquarters. He then turned in his club check reports at headquarters and was sent to determine whether the Ukrainian-American Club had already been checked by another officer. Coughlin explains the events which the I-Team described as "suspicious" as follows: When he arrived at American Street, he saw another police officer driving away. He followed in order to ask whether the officer had checked the Ukrainian-American Club. After losing sight of the patrol car, he returned to the club. He went inside, learned that another officer had just checked the club, and left immediately. He claims that the object in his hand was a 48 book. He also asserts that the officers in his district were not required to wear uniform jackets that night.

Coughlin describes the I-Team's attempt to interview him on February 10, 1982, as an "ambush." According to Coughlin, when he returned from work early that morning two men confronted him outside his house. One was operating a television camera and the other began to question Coughlin about his activities on October 11, 1981. Coughlin claims he was unnerved by the camera and by the abrupt questioning. The reporters refused to turn the camera off, and Coughlin therefore refused to answer their questions.

In order to be entitled to summary judgment, defendant must show that there is "no genuine issue as to any material fact" and that it is "entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The first question presented by defendant's summary judgment motion is whether the challenged statements are capable of defamatory meaning. Under Pennsylvania law, "[a] communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Corabi v. Curtis Publishing Co.*, 441 Pa. 432, 442, 273 A.2d 899, 904 (1971) (quoting Restatement of Torts §559 (1938)). The allegedly defamatory statements must be read in context:

> The test is the effect the [communication] is fairly calculated to produce, the impression it would naturally engender, in

> the minds of the average persons among whom it is intended to circulate. The words must be given by judges and juries the same signification that other people are likely to attribute to them.

Id. at 447, 273 A.2d at 907 (quoting *Boyer v. Pitt Publishing Co.*, 324 Pa. 154, 157, 188 A. 203, 204 (1936)). *Accord Marcone v. Penthouse International*, No. 84-1004, slip op. at 8 (3d Cir. Feb. 6, 1985).

Defendant's broadcast is clearly capable of a defamatory meaning. The broadcast outlined the apparent law enforcement problems on American Street and, quoting a 1974 Pennsylvania Crime Commission Report, characterized the situation as "ripe for corruption." The narrator described the police activities filmed on October 11, 1981, as "the most suspicious activity we saw on American Street." The subsequent films and descriptions of Officer Coughlin, considered in the context of the entire broadcast, are reasonably susceptible to the interpretation that Coughlin accepted a bribe. The I-Team's presentation of its attempt to interview him reinforced the implication that he was evasive and therefore guilty of corrupt activities. Because I conclude that the broadcast is capable of a defamatory meaning, it would be for a jury to determine whether that meaning was conveyed to the broadcast's audience. *Corabi*, 441 Pa. at 442, 273 A.2d at 904.

Defendant also seeks summary judgment on the ground that the broadcast was substantially true. Defendant argues that each allegedly defamatory statement was either true or a protected expression of opinion. Under Pennsylvania law, however, allegedly defamatory words must be read in context. *Pierce v. Capital Cities Communications, Inc.*, 576 F.2d 495, 502 (3d Cir.), *cert. denied*, 439 U.S. 861 (1978). The literal accuracy of individual statements will not insulate a defendant from liability where the overall impression left by those statements is false. According to the Pennsylvania Superior Court, " 'true facts' that in context imply a falsehood are, in an action for defamation, not 'true.' " *Dunlap v. Philadelphia Newspapers, Inc.*, 301 Pa. Super. Ct. 475, 491, 448 A.2d 6, 15 (1982). Thus, it is not sufficient for

defendant " 'to take every sentence separately and demonstrate its individual accuracy, detached and wrenched out of context.' " *Id.* at 493, 448 A.2d at 15-16 (quoted *Clark v. Pearson*, 248 F. Supp. 188, 191 (D.D.C. 1965)).

I have already determined that the broadcast can reasonably be construed as implying that Officer Coughlin was involved in corrupt activities. Plaintiffs have presented evidence, including the affidavit of Coughlin himself and the testimony of other police officers, that this implication was false. Defendant has not seriously challenged plaintiffs' explanation for the events of October 11, 1981. In fact, on February 20, 1982, KYW aired a follow-up program during which the president of the Fraternal Order of Police presented Coughlin's version of those events. I conclude that there is a genuine issue of fact concerning the truthfulness of those segments of the broadcast dealing with Coughlin.[6]

Defendant's final argument is that plaintiffs must show "actual malice" on its part in order to prevail. Defendant contends that the record contains no evidence of malice, and that it is therefore entitled to summary judgment. Plaintiffs claim that Officer Coughlin, the target of the alleged defamation, is not a public official required to prove malice under *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

Courts have consistently treated police officers as public officials within the meaning of *New York Times*. *See, e.g., Time, Inc. v. Pape*. 401 U.S. 279, 284 (1971); *St. Amant v. Thompson*, 390 U.S. 727, 730 (1968); *Henry v. Collins*, 380 U.S. 356 (1965); *Cibenko v. World Publishers*, 510 F. Supp. 761., 765 (D.N.J. 1981); *Dunlap v. Philadelphia Newspapers, Inc.*, 301 Pa. Super.

6. The Pennsylvania Supreme Court has recently held, in a defamation case involving a private figure plaintiff, that the defendant bears the burden of proving an allegedly defamatory statement to be true. *Hepps v. Philadelphia Newspapers, Inc.*, 485 A.2d 374 (Pa. 1984). Although it is arguable that *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), requires the plaintiff, at least when plaintiff is a public official or public figure, to bear the burden of proving falsity, I need not decide the issue at this time. Regardless of which party bears the burden of proof, there is a genuine issue of fact as to the truth or falsity of the broadcast.

Ct. 475, 493-94, 448 A.2d 6, 16 (1982). Police officers qualify as public officials because:

> They "have or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs," . . . . and their position "has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees. . . ." The cop on the beat is the member of the department who is most visible to the public. He possesses both the authority and the ability to exercise force. Misuse of his authority can result in significant deprivation of constitutional rights and personal freedoms, not to mention bodily injury and financial loss. The strong public interest in ensuring open discussion and criticism of his qualifications and job performance warrant the conclusion that he is a public officials.

Gray v. Udevitz, 656 F.2d 588, 591 (10th Cir. 1981) (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 85-86 (1966)) (citations omitted).

Officer Coughlin is a public official[7] and the broadcast related to his official conduct. Plaintiffs must therefore prove that defendant aired the broadcast with "actual malice," that is, "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times*, 376 U.S. at 279-80.

Plaintiffs argue that the I-Team's hostility toward the police, its reliance on biased sources and its failure to investigate establish the existence of actual malice. Viewing the evidence in

7. Plaintiffs, relying upon *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), argue that Coughlin is not a "public official" because he did not thrust himself into a public controversy and does not have significantly greater access to the media than a private citizen has. Under *Gertz*, however, those factors are relevant only to the question of whether a plaintiff who does not qualify as a public official is a "public figure." *Id.* at 351-52. Because I conclude that Coughlin is a public official under *New York Times*, I need not reach the question of whether he is public figure.

the light most favorable to plaintiffs, as I must under Fed.R.Civ.P. 56, I agree that defendant's reporters showed little concern for the truth when they developed "After Hours on American Street." I cannot conclude, however, that plaintiffs have set forth sufficient evidence of malice to withstand defendant's motion for summary judgment.

Under *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968), the evidence must "permit the conclusion that the defendant *in fact* entertained serious doubts as to the truth of his publication." (Emphasis added.) Malice cannot be inferred from a reporter's general hostility toward or bias against a subject.[8] *Natural Association of Letter Carriers v. Austin*, 418 U.S. 264, 281 (1974) ("hatred, spite, ill will, or desire to injure" is not an element of the malice required by *New York Times*); *Rebozo v. Washington Post Co.*, 637 F.2d 375, 380 (5th Cir.), *cert. denied*, 454 U.S. 964 (1981). Absent a showing of reckless indifference to the truth, evidence that an investigation was "designed to confirm a hostile premise rather than to find the truth" does not establish malice. *Westmoreland v. CBS Inc.*, 596 F. Supp. 1170, 1173 (S.D.N.Y. 1984). *Accord Herbert v. Lando*, 596 F. Supp. 1178, 1224-26 (S.D.N.Y. 1984). As Judge Leval noted in *Westmoreland*, "[r]eporters of course investigate where their suspicions lie. A previously formed belief rebuts as much as it establishes constitutional malice, as it tends to demonstrate sincerity." 596 F. Supp. at 1174. Evidence of failure to investigate, even if it establishes that defendant was indifferent to the truth of an allegedly defamatory communication, is also insufficient to show that defendant acted with malice. *St. Amant*, 390 U.S. at 733; *Marcone v. Penthouse International*, No. 84-1004, slip op. at 32-34 (3d Cir. Feb. 6, 1985); *Dickey v. CBS, Inc.*, 441 F. Supp. 1133, 1141 (E.D. Pa. 1977), *aff'd*, 583 F.2d 1221 (3d Cir. 1978).

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8. Even if hostility were a factor in determining malice, I perceive little, if any, evidence in the record that the I-Team's investigation was motivated by ill will. Plaintiffs' claim that hostility existed is undercut by the consistent testimony of both KYW personnel and police officers that, despite occasional differences of opinion, the relationship between KYW and the police department was basically amicable.

Defendant's employees, by affidavit and in deposition testimony, assert that the allegedly defamatory statements consisted of inferences drawn from observed facts and accurate reports of complaints made by the Ukrainian-American Club's neighbors. They claim they honestly believed the officer who dealt with the club's vandalism complaint at 12:50 a.m. on October 11, 1981, was not Coughlin, and that the object in Coughlin's hand when he left the club shortly after 4:00 a.m. was an envelope. In addition, they claim that they merely presented their perceptions as to the facts, and left the audience to draw its own conclusions based upon the film clippings and accompanying narrative.[9]

The absence of intent to defame, of course, does not shield a defendant from liability for defamation. *St. Amant*, 390 U.S. at 732. Moreover, a jury could clearly find that the I-Team was at least aware that the broadcast could be interpreted as implicitly accusing Coughlin of corrupt activities. The evidence which would support such a finding, however, would not support a finding that defendant's employees did not believe their implicit accusations were true, or that they acted with reckless disregard for the truth. Plaintiffs have not set forth evidence sufficient to create an issue as to whether defendant's statements were "so inherently improbable that only a reckless man would have put them in circulation." *Id.* In fact, the evidence relevant to the state of mind of defendant's employees indicates that, although they did not seriously explore other possible explanations for

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9. *See* Deposition of Pasquale L. Polillo at 85-87 (May 3, 1984). Polillo, the General Manager of KYW-TV, gave final approval to the broadcast. Plaintiffs contend that Polillo admitted defendant knew the broadcast's implications concerning Coughlin were false, but aired the broadcast for the sake of "impact." I have reviewed Polillo's testimony and find no support for plaintiffs' interpretation. Polillo testified that he had not felt it necessary to verify what was in Coughlin's hand, because the public could "make up its own mind" concerning what the videotape showed. He also stated, however, that he had had no basis for suspecting anything in the broadcast to be inaccurate, and that he had personally believed that Coughlin was holding an envelope. Although Polillo's remarks may show that defendant did not conduct a thorough investigation, they cannot reasonably be construed to show that defendant acted with reckless disregard of the truth.

Coughlin's behavior, the conclusions which they drew based on their observations were reasonable.

The I-Team's investigation began as the result of persistent complaints concerning illegal and disruptive activities at the club. Reporters observed activities which they felt were inconsistent with proper law enforcement. Their suspicions were reinforced by a 1974 Pennsylvania Crime Commission report, which noted the potential for corruption that exists when police officers monitor private clubs. Barbara Bailey, an attorney who supervised the Crime Commission's 1974 investigation, confirmed that the activities shown in the I-Team's videotapes were similar to activities which had raised the Crime Commission's suspicions in 1974.

Representatives of the Philadelphia Police Department also agreed that the activities videotaped on October 11 raised questions concerning whether the police officers involved were performing their duties. Deputy Police Commmissioner Robert Armstrong was sufficiently concerned with the possibility of corruption that he ordered an internal investigation of Coughlin's activities. Commissioner Armstrong testified at his deposition that he personally believed the I-Team's films showed Coughlin with a 48 book in his hand. He stated, however, that it was not unreasonable to conclude that the object in Coughlin's hand was an envelope. In fact, he noted that the police department, after conducting interviews and laboratory tests and consulting with the FBI, had been unable to reach an official conclusion concerning the object's identity. In addition, Commissioner Armstrong, together with other members of the Philadelphia Police Department, testified that Coughlin had not followed department procedures with respect to his log book entries and his uniform.

As I have already determined, a jury could find that Coughlin's actions were due to inexperience, not corruption. An issue also exists as to whether the I-Team, with a minimum of effort, could have discovered the truth. The Supreme Court's mandate, however, is clear: "reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing." *St. Amant*, 390 U.S.

at 731. The evidence in this case would not support a finding that the I-Team's interpretation of Coughlin's behavior as indicative of corruption was so unreasonable as to give rise to an inference of actual malice. *See Marcone*, slip op. at 36 (actual malice not shown when "mistakes appear to be the result of insufficient editorial verification and checking procedures, but not of a conscious decision to present [plaintiff] in a false light.") The fact that the broadcast was not "hot news" and defendant had time to investigate is not sufficient to demonstrate the existence of malice. *See Dickey v. CBS, Inc.*, 583 F.2d 1221, 1228 n.9 (3d Cir. 1978); *Barger v. Playboy Enterprises*, 564 F. Supp. 1151, 1156 (N.D. Cal. 1983), *aff'd mem.*, 732 F.2d 163 (9th Cir.), *cert. denied*, 53 U.S.L.W. 3239 (U.S. Oct. 10, 1984). The Supreme Court in *St. Amant v. Thompson*, 390 U.S. at 731-32, noted that its definition of malice as subjective awareness of falsity:

> may be said . . . [to] put[ ] a premium on ignorance, encourage[ ] the irresponsible publisher not to inquire, and permit[ ] the issue to be determined by the defendant's testimony that he published the statement in good faith and unaware of its probable falsity. Concedely the reckless disregard standard may permit recovery in fewer situations than would a rule that publishers must satisfy the standard of the reasonable man or the prudent publisher. But *New York Times* and succeeding cases have emphasized that the stake of the people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies. Neither lies nor false communications serve the ends of the First Amendment, and no one suggests their desirability or further proliferation. But to insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones.

I note that the parties have presented opposing viewpoints as to the propriety of granting summary judgment where the presence of "actual malice" is at issue. Defendant argues that,

because interests protected by the First Amendment are at stake, summary judgment is particularly appropriate. Defendant quotes *Bose Corp. v. Consumers Union*, 52 U.S.L.W. 4513, 4520 (U.S. Apr. 30, 1984):

> The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of "actual malice."

Plaintiffs rely upon *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979), for the proposition that "proof of 'actual malice' calls a defendant's state of mind into question . . . and does not readily lend itself to summary disposition."

I am not persuaded that the special proof requirements enunciated in *Bose* should apply at the summary judgment stage. *Bose* dealt with the function of an appellate court reviewing a finding of actual malice in a defamation case. The Supreme Court held that the sensitive constitutional interests at stake necessitated stringent and independent appellate review. The court's role is different at the summary judgment stage, which involves a preliminary inquiry into whether a plaintiff has raised triable issues of fact. Plaintiffs should not be compelled in effect to provide their entire case before trial. *See Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1570-71 (D.C. Cir. 1984).

The question remains, however, whether under *New York Times Co. v. Sullivan* I must consider even the preliminary matter before me in light of plaintiff's ultimate burden of proof. *See* 376 U.S. at 285-88 (public official plaintiff must prove malice with "convincing clarity;" evidence which would support a finding of negligence may be insufficient to support a finding of actual malice). A number of courts have held that the degree of evidence which plaintiffs must present will affect defendant's ability to show, as required by Fed.R.Civ.P. 56, that no genuine issues of material fact exist. Under this approach, the propriety

of granting summary judgment depends upon whether, "viewing the evidence and all inferences arising therefrom in the light most favorable to the plaintiff, there appears a genuine issue of fact from which a jury could reasonably find actual malice with convincing clarity." *Brophy v. Philadelphia Newspapers, Inc.*, 281 Pa. Super. Ct. 588, 601, 422 A.2d 625, 632 (1980). *Accord Yiamouyiannis v. Consumers Union*, 619 F.2d 932, 940 (2d Cir.), *cert. denied*, 449 U.S. 839 (1980); *Bryant v. Associated Press*, 595 F. Supp. 814, 818 (D.V.I. 1984); *Nader v. de Toledano*, 408 A.2d 31, 49-50 (D.C. 1979), *cert. denied*, 444 U.S. 1078 (1980).

It is difficult to determine from the single footnote in *Hutchinson v. Proxmire*, 443 U.S. at 120 n.9, how the Supreme Court will ultimately decide this issue. I interpret that footnote, however, as indicating that courts should not form what amounts to a presumption favoring summary judgment in order to protect a defendant's First Amendment rights. *See Steaks Unlimited v. Deaner*, 623 F.2d 264, 275 n.56 (3d Cir. 1980). I do not believe that the Supreme Court intended to preclude the use of summary judgment, when appropriate under a neutral application of Rule 56, to dispose of "potentially frivolous suits that threaten First Amendment freedoms." *Brophy*, 281 Pa. Super. Ct. at 599, 422 A.2d at 631. Defendant Westinghouse has shown, as required by Rule 56, that no genuine issues of material fact exist. I will therefore grant defendant's motion for summary judgment.

Defendant is also entitled to summary judgment with respect to plaintiffs' remaining claims. Because Coughlin is a public official, plaintiffs must prove malice on defendant's part in order to prevail on their claim that the broadcast portrayed Coughlin in a false light. *See Time, Inc. v. Hill*, 385 U.S. 374, 390 (1967); *Goldman v. Time, Inc.*, 336 F. Supp. 133, 137-38 (N.D. Cal. 1971); Restatement (Second) of Torts §652E(b) and comment d (1977). My determination that the evidence would not support a finding of malice requires that I grant summary judgment as to plaintiffs' false light claim. Plaintiffs' claim for punitive damages falls on the same basis. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349-50 (1974) (plaintiff must prove malice in order

to recover punitive damages). Similarly, I do not perceive sufficient evidence to support plaintiffs' claim that defendant is liable for intentional infliction of emotional distress. Liability for emotional distress can be found "only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Restatement (Second) of Torts §46 comment d (1977). Even proof of malice or intent to inflict emotional distress is an insufficient basis for liability. Because the evidence would not support a finding that defendant's conduct was extreme or outrageous, I must grant summary judgment as to plaintiffs' claim for emotional distress. *Chuy v. Philadelphia Eagles Football Club*, 595 F.2d 1265, 1274 (3d Cir. 1979).

Defendant has also demonstrated that no genuine issue of fact exists with respect to plaintiffs' claim for invasion of privacy. Under Pennsylvania law, an invasion of privacy action can be brought on any one of four grounds: "(1) intrusion upon seclusion, (2) appropriation of name or likeness, (3) publicity given to private life, and (4) publicity placing a person in a false light." *Martin v. Municipal Publications*, 510 F. Supp. 255, 259 (E.D. Pa. 1981). *Accord Vogel v. W.T. Grant Co.*, 458 Pa. 124, 129 n.9, 327 A.2d 133, 136 n.9 (1974). Plaintiffs allege that defendant's broadcast is actionable on the third and fourth grounds. I have already determined that plaintiffs' false light claim is not viable. Plaintiffs' claim that defendant publicized Coughlin's private life must also fall, because the broadcast dealt with Coughlin's public activity as a police officer. A police officer's on-the-job activities are matters of legitimate public interest, not private facts. A publication dealing with those activities thus cannot be the basis for an invasion of private action. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492-95 (1975); Restatement (Second) of Torts §652D and comments b, d (1977).

Finally, because I have determined that James Coughlin has no viable claim against defendant, Patricia Coughlin's derivative claims must also fall. A wife's claim for loss of her husband's consortium depends upon proof that an actionable wrong was committed against her husband. *Little v. Jarvis*, 219 Pa. Super. Ct.

156, 162, 280 A.2d 617, 620 (1971). *See also Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 574 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977). Defendant is therefore entitled to summary judgment with respect to Patricia Coughlin's claims.

III.

The task of balancing plaintiffs' interest in vindicating James Coughlin's reputation against defendant's First Amendment rights is a difficult one. With respect to plaintiffs' discovery motion, however, the balance has already been struck in defendant's favor by the Pennsylvania Shield Law. Because of the broad privilege which the shield law grants to media defendants in defamation cases, I must deny plaintiffs' motion to compel discovery. Moreover, I am constrained under recent Supreme Court and Third Circuit precedent to conclude that no genuine issues of fact remain in this case and that defendant is entitled to a judgment as a matter of law. I will therefore grant defendant's motion for summary judgment.

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Ch. J.